Supreme Court, U.S.
FILED

No. 03-1088 JAN 26 2004

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SCOTT RISE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN M. GLYNN
Counsel of Record
CRAIG W. ALBEE
GLYNN, FITZGERALD & ALBEE, S.C.
526 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 221-9600
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does 18 U.S.C. §1346, which provides that "scheme or artifice to defraud" as used in the mail and wire fraud statutes includes a scheme to deprive another of "the intangible right of honest services," require the government to establish that actual harm to the victim was intended or reasonably foreseeable in a private sector mail or wire fraud prosecution?

2. Is 18 U.S.C. §1346 unconstitutionally vague as applied, where the government relies on the breach of a provision of a state code of legal ethics to impose criminal liability on a lawyer *and* a chiropractor who is not bound by the code?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	6
I. The Circuits Are Split on Whether the Government Must Prove Reasonably Foreseeable Harm in a Private Sector Intangible Rights Mail Fraud Prosecution	6
A. The Majority of Circuits to Address the Questions Have Held that the Government Must Prove Reasonably Foreseeable or Contemplated Harm to Another	6
B. The Issue is Important	12
C. The Seventh Circuit's Decision Should be Reversed	16
II. Section 1346 is Unconstitutionally Vague	18
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Connally v. General Constr. Co., 269 U.S. 385 (1926) 19

Kolender v. Lawson, 461 U.S. 352 (1983) 18, 19

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 19

McBoyle v. United States, 283 U.S. 25 (1931) 18

McNally v. United States, 483 U.S. 350 (1987) 10, 12

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 19

United States v. Bloom, 149 F.3d 649 (7th Cir. 1998) 10, 13, 15, 19

United States v. Brumley, 116 F.3d 728 (5th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997) 14, 18

United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) 13

United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994) 9

United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000) 7, 11, 12

United States v. Feldman, 711 F.2d 758 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983) 10

United States v. Frost, 125 F.3d 346 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998) 7, 8, 11

United States v. Gray, 96 F.3d 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Handakas, 286 F.3d 92 (2d Cir.), *cert. denied*, 537 U.S. 894 (2002), *overruled by United States v. Rybicki*, 2003 WL 23018917 (2d Cir. 2003) (in banc) 21, 22

United States v. Hausmann, 345 F.3d 952 (7th Cir.), *reh'g denied*, (2003) 1, 6

United States v. Jain, 93 F.3d 436 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997) 7, 12, 13

United States v. Lanier, 520 U.S. 259 (1997) 18, 19

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) 7, 8, 11, 16

United States v. Martin, 228 F.3d 1 (1st Cir. 2000) 7, 13, 14

United States v. Panarella, 277 F.3d 678 (3rd Cir.), *cert. denied*, 537 U.S. 819 (2002) 14

United States v. Rybicki, 287 F.3d 257 (2d Cir. 2002), *rev'd* in banc, 2003 WL 23018917 (2d Cir. 2003) 9, 14

United States v. Rybicki, ___ F.3d ___, 2003 WL 23018917 (2d Cir. 2003) (in banc) 9, 10, 14, 22

United States v. Sun-Diamond Growers, 138 F.3d 961 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999) 7

United States v. Vinyard, 266 F.3d 320 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) 7

United States v. Welch, 327 F.3d 1081 (10th Cir. 2003) 14

CONSTITUTION, RULES AND STATUTES

18 U.S.C. §2 3

18 U.S.C. §371 ..... 1, 3

18 U.S.C. §1341 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. §1343 ..... 2, 3, 13, 14, 18

18 U.S.C. §1346 ..... *passim*

28 U.S.C. §1254(1) 1

WIS. SUP. CT. R. 20:1.7(b) 15, 21

OTHER AUTHORITIES

ABA MODEL RULES OF PROFESSIONAL CONDUCT, Preamble and Scope (2002) 20

BLACK'S LAW DICTIONARY 18

John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998) 12

LaFave & Scott, SUBSTANTIVE CRIMINAL LAW (1986) 20

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at *United States v. Hausmann*, 345 F.3d 952 (7th Cir.), *reh'g denied* (2003), and is in Appendix 1 (App. 1). The opinion of the District Court is unreported and is in Appendix 16. A copy of the report and recommendation of the Magistrate Judge is in Appendix 33.

JURISDICTION

The Seventh Circuit entered its judgment on September 22, 2003 (App. 1), and it denied the Petition for Rehearing and Suggestion for Rehearing En Banc on October 28, 2003 (App. 68). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN THE CASE

The Fifth Amendment to the United States Constitution provides in pertinent part: "no person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

At issue is the application of the mail and wire fraud statutes:

18 U.S.C.

> **§371. Conspiracy to Commit Offense or to Defraud United States.** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States,

or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

§1341. Frauds and Swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than one million dollars or imprisoned not more than thirty years, or both.

§1343. Fraud by Wire, Radio, or Television. Whoever, having devised or intending to devise

any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than one million dollars or imprisoned not more than thirty years, or both.

§1346. Definition of "Scheme or Artifice to Defraud". For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

On January 8, 2002, attorney Charles Hausmann and chiropractor Scott Rise were indicted for conspiring to commit mail and wire fraud offenses between October 13, 1999, and June 21, 2001, in violation of Title 18, United States Code, sections 371, 1341, 1343, and 2 (App. 69). The defendants had a referral arrangement under which Mr. Hausmann's personal injury law firm, Hausmann-McNally (HM), directed clients to Dr. Rise's chiropractic clinic, Milwaukee Spinal Injury Clinic (MSIC), for medical care, usually for injuries suffered in automobile accidents. HM's standard fee agreement provided that HM would receive one-third of the insurance settlement and that the client would receive two-thirds, from which expenses, including

medical bills, would be subtracted. When MSIC received payments from the insurance settlements, Rise then would write checks to others (primarily to support charitable work and a joint chiropractic marketing plan) at Mr. Hausmann's direction approximating 20% of the total paid medical bills on the referred cases. During the period charged in the indictment, MSIC received checks from HM in the amount of $371,862.39 for medical bills and MSIC wrote checks totaling $77,062.87 to third parties at Hausmann's direction. Hausmann did not inform clients that he had an interest in the paid medical bills.

It is undisputed that MSIC legitimately earned the money it received for providing medical services. The government never claimed that Dr. Rise overcharged clients for medical services, that Dr. Rise's clinic provided anything but excellent medical care, or that the clinic inflated bills by extending treatment or performing unnecessary treatment. The relationship between HM and MSIC provided additional benefits to the clients, including that medical bills did not have to be paid until claims were settled, medical bills were written off if HM failed to obtain a settlement, and HM frequently negotiated MSIC's bills to save the clients money.

The indictment charged that by engaging in these activities, Hausmann and Rise conspired to commit mail and wire fraud by depriving the law firm's clients of their intangible right of honest services (App. 69). According to the government, these activities violated HM's fiduciary duty to disclose to clients any financial interest the firm may have involving the representation, to advise clients in a conflict-free manner, to negotiate in the best interest of the client, and to provide accurate and complete information to the clients regarding the financial terms of

personal injury case settlements, as well as the amount of compensation taken by the lawyers involved in the case (App. 69 at 70-71).

By pretrial motion both defendants asserted that the indictment failed to charge an offense and that the mail fraud statute was unconstitutionally vague as applied. In particular, the defendants argued that the indictment failed to allege that the arrangement posed any reasonably foreseeable harm to the clients. The Magistrate Judge recommended that these motions be denied (App. 33) and the district court, the Honorable Charles M. Clevert, adopted that recommendation (App. 16). Mr. Hausmann pled guilty to the conspiracy charge, but preserved his right to challenge the indictment and the constitutionality of the mail fraud statute.

Following a one week trial, the jury found Dr. Rise guilty of the conspiracy on June 10, 2002. The district court refused to instruct the jury that it must find that the defendants contemplated that the clients would be harmed by the alleged scheme or that harm was reasonably foreseeable (App. 23). The district court also denied Rise's motions for judgment of acquittal (App. 19 at 21). On October 23, 2002, Judge Clevert sentenced Rise to a term of imprisonment of two months and to one year of supervised release with the condition that Rise serve four months in home confinement with electronic monitoring. The court imposed fines of $10,000 each and ordered the defendants to pay the special assessment of $100 and restitution in the amount of $77,062.87. The court stayed the prison sentence pending appeal.

The Seventh Circuit affirmed in an opinion dated September 22, 2003 (App. 1). The defendants filed

petitions for rehearing and suggestions for rehearing *en banc*, which the court denied in an October 28, 2003, order (App. 68).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Circuits Are Split on Whether the Government Must Prove Reasonably Foreseeable Harm in a Private Sector Intangible Rights Mail Fraud Prosecution.

A. The Majority of Circuits to Address the Question Have Held that the Government Must Prove Reasonably Foreseeable or Contemplated Harm to Another.

This case involves a question of exceptional importance concerning the scope of the intangible rights theory of criminal responsibility in mail and wire fraud cases. In an effort to impose reasonable limits on prosecutions under the intangible rights doctrine, several circuits have adopted a requirement in private sector mail fraud prosecutions that the government must prove that harm to another was contemplated by or reasonably foreseeable to the defendant. Although the Seventh Circuit expressed "doubts as to the applicability of these 'intangible-rights theory' provisions of the mail and wire fraud statutes to cases of breach of fiduciary duty with nothing more," the court rejected a requirement of reasonably foreseeable harm, concluding that there "is no requirement . . . that a co-conspirator to a wire and mail fraud scheme contemplate actual or foreseeable harm to the victim." *Hausmann*, 345 F.3d at 956, 959.

The Seventh Circuit's decision conflicts with the majority of the courts that have considered this issue. The First, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits all require the government to prove that harm was contemplated by or reasonably foreseeable to the defendant to establish mail fraud in a private sector case. *See, e.g.*, *United States v. Martin*, 228 F.3d 1, 17-18 (1st Cir. 2000); *United States v. Vinyard*, 266 F.3d 320, 327-29 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997); *United States v. deVegter*, 198 F.3d 1324, 1330 (11th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000) ("a private sector violation of §1346 honest services fraud involves a breach of a fiduciary duty and reasonably foreseeable economic harm"); *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983), *cert denied*, 467 U.S. 1226 (1984).

In *Lemire*, 720 F.2d 1327, the court examined the rationale underlying the criminalization of the deprivation of honest services in the private sector. The court reasoned that employee loyalty is not an end in itself, but a means of obtaining and preserving pecuniary benefits for the employer. *Id.* at 1336. The employer's interest in loyalty and avoiding conflicts of interest by employees arises from the concern that a conflicted employee will act in a manner detrimental to the employer's economic interests. *Id.* An undisclosed conflict of interest, however, does not in itself necessarily pose a threat of economic harm to the employer. *Id.* Rather than permit the criminalization of any undisclosed conflict of interest or breach of duty by an

employee, the court held that "an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute." *Id.* at 1337. Therefore, "[t]he crucial determination must be whether the jury could infer that the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction." *Id.*

Likewise in *Frost*, 125 F.3d 346, the court held that a §1346 claim against a "non-public official" requires more than merely depriving the private fiduciary of the employee's honesty. The government must prove that "the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 368. The court emphasized that proof that the employer suffered only the loss of loyalty and fidelity of the defendant is insufficient to convict. *Id.* In reaching its decision, the court recognized that the literal terms of the statute imposed no such limitation on the government. *Id.* Nonetheless, it refused to interpret the statute more broadly "to avoid the over-criminalization of private relationships" that would result from criminalizing mere losses of loyalty and faithful services. *Id.*

In *Jain*, a case strikingly similar to this one, the court reversed the defendant psychologist's mail fraud conviction under 18 U.S.C. §§1341 and 1346 arising out of a scheme where the psychologist was paid kickbacks by a hospital for patient referrals. 93 F.3d at 441. The court concluded that there was no evidence that Dr. Jain intended to defraud anyone, noting that although he "extracted undisclosed, unethical referral fees from an

interested third party provider, there is no independent evidence proving that he thereby intended to defraud his patients." *Id.* at 442. The government acknowledged that the patients who had been referred to North Hills were appropriately hospitalized, and there was evidence concerning the excellent care provided by the hospital generally and of Dr. Jain's clinic's good relationship with the hospital. *Id.* at 439. There was no claim of unnecessary care or excessive hospitalization. *Id.* The court held that "the government must show some actual harm or injury was *contemplated* by the schemer" to procure a conviction for mail fraud under the intangible rights doctrine in the private sector. *Id.* at 441 (quoting *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (emphasis in original)).

The only other court to join the Seventh Circuit in expressly rejecting a requirement of reasonably foreseeable harm, or some equivalent standard, is the Second Circuit. In *United States v. Rybicki*, ___ F.3d ___, 2003 WL 23018917 (2d Cir. 2003) (in banc), that court recently reversed a panel decision that had required proof of reasonably foreseeable harm. *See United States v. Rybicki*, 287 F.3d 257, 266 (2d Cir. 2002), *rev'd* in banc, 2003 WL 23018917 (2d Cir. 2003). In reversing the panel, however, the in banc court suggested that the government's obligation to prove harm in a private sector prosecution may depend on the type of case involved. *Rybicki*, 2003 WL 23018917 at *11. The court held that no such obligation arises in kickback cases. *Id.* However, in "self-dealing" cases the government may have to establish that the

employee's conflict of interest caused, or was capable of causing, some detriment to the employer.[1] *Id.*

In this case, the Seventh Circuit did not explain why it would not follow the cases from the other circuits imposing a requirement of reasonably foreseeable harm. The court also declined to address a Seventh Circuit case consistent with requiring proof of reasonably foreseeable harm to the victim. In a case decided prior to *McNally v. United States*, 483 U.S. 350 (1987), and the subsequent enactment of 18 U.S.C. §1346, the Seventh Circuit held that for an employee's breach of duty to constitute mail fraud there must be a showing that the nondisclosure "could or does result in actual harm to the employer." *United States v. Feldman*, 711 F.2d 758, 763 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983). Rather, the court relied in large part on its decision in *United States v. Bloom*, 149 F.3d 649, 655-56 (7th Cir. 1998), which held in a *public sector* prosecution that liability under the intangible rights theory may result where a defendant misuses his fiduciary relationship for personal gain. Thus, the Seventh Circuit apparently does not distinguish between private and public sector mail fraud prosecutions.

---

[1] Although MSIC's payments at Hausmann's direction have been characterized as "kickbacks," this is a "self-dealing" case as that term is defined by the Second Circuit. In self-dealing cases "the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." *Rybicki*, ___ F.3d ___, 2003 WL 23018917 at *10. In this case, it is Hausmann's secret interest in MSIC's paid medical bills that the government asserts deprived his clients of honest services.

The decisions favoring a requirement of contemplated or reasonably foreseeable harm have recognized that the justification for imposing criminal liability for the deprivation of honest services is much weaker in the private sector. In *Lemire*, 720 F.2d 1327, the court held that an undisclosed conflict of interest, without more, will not establish the intent to defraud an employer necessary to support a mail or wire fraud conviction. The court noted that an undisclosed conflict of interest by a public official might be treated differently: "Public officials may be held to a higher standard of public trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness." 720 F.2d at 1337 n. 13. Likewise in *Frost*, 125 F.3d at 365, the court emphasized that enforcement of an intangible right to honest services in the private sector has a much weaker justification than in the public sector because "relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving 'honest services' for their own sake".

deVegter, 198 F.3d at 1328-29, also recognized that the intangible right of honest services has different implications when applied to public official malfeasance and private sector misconduct. The court held that illicit personal gain by a government official would deprive the public of its intangible right to the honest services of the official, but illicit personal gain alone would not be enough in the private sector where the government must prove that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach. *Id.* The court emphasized that an employee's undisclosed conflict of interest did not by itself necessarily pose a threat of economic harm to the

employer while a public official's undisclosed conflict of interest "does by itself harm the constituents' interest in the end for which the official serves – honest government and the public's best interest." *Id.* at 1328. Therefore, in order for a private sector defendant to have violated the victim's right to honest services, something more must be proven than simply a breach of loyalty. *Id.* at 1328-29; *see also Jain*, 93 F.3d at 442.

Professor Coffee favors a "sharp distinction" between public and private fiduciaries in the reach of the mail fraud statutes. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 459-63 (1998). He also proposes that in private fiduciary cases the jury should be required to find that the defendant violated a state law or an independent federal statute *and* that actual harm should have been intended, or at least reasonably foreseen. *Id.*

Thus, the Seventh Circuit's decision here conflicts with the majority of other circuits to decide these issues in two important ways. The court recognizes no distinction in the "honest services" owed by public and private fiduciaries and it does not require proof of reasonably foreseeable harm. These are significant conflicts that ought to be resolved by this Court.

B. The Issue Is Important.

The expansive reach of the intangible rights theory of criminal responsibility has been a source of continuing concern in the federal courts. This Court held in *McNally*, 438 U.S. 350, that the federal mail and wire fraud statutes applied only to schemes designed to deprive victims of their money or property and not to schemes designed to

deprive the victims only of their intangible rights to honest services. Congress responded by enacting 18 U.S.C. §1346, which expressly defined "scheme to defraud" as used in the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services." Congress, however, declined to define that phrase. As a result, the circuit courts continue to register concerns regarding the seemingly limitless potential reach of §1346 and struggle to delineate which breaches of duty rise to the level of criminal fraud. *See, e.g., Bloom*, 149 F.3d at 654 ("it is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by five years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie that many decisions say cannot exist"); *Martin*, 195 F.3d at 965 ("[A] century of interpretation of the [mail fraud] statute has failed to still the doubts of those who think it dangerously vague").

While the circuit courts are in general agreement that §§1341, 1343, and 1346 pose a risk of over-criminalization, the courts disagree as to whether and how to impose meaningful limitations on these statutes. As noted above, some courts have imposed a requirement of reasonably foreseeable harm, while others have rejected that standard. Other courts have sought to rein in the statute by requiring that the misrepresentation or omission by the fiduciary be material. *E.g., United States v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 774-775 (5th Cir. 1996), *cert. denied*, 520 U.S. 1129 (1997); *see also Jain*, 93 F.3d at 441-42. The Fifth Circuit requires that the honest services "must be owed

under state law and that the government must prove in a federal prosecution that they were in fact not delivered," *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1028 (1997),[2] but the other circuits to consider the question have declined to impose that requirement. *See Martin*, 195 F.3d at 966 (citing cases). The Seventh Circuit requires an intent to achieve personal gain, *see* App. 1 at 6, but other circuits have held that personal gain is not an element of the offense. *See United States v. Welch*, 327 F.3d 1081, 1106-07 (10th Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 691-93 (3rd Cir.), *cert. denied*, 537 U.S. 819 (2002).

As the dissenters in *Rybicki* recently noted, this "lack of coherence has created 'a truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit.'" *Rybicki*, F.3d, 2003 WL 23018917 at *32 (quoting *Brumley*, 116 F.3d at 743 n. 6 (Jolly, J., dissenting)). Worse, it is impossible to predict how a circuit will decide an issue that has not yet been settled in that circuit, such as whether the government must prove reasonably foreseeable harm. As a result, lawyers, let alone ordinary citizens, cannot begin to determine the

---

[2] *Brumley* also holds that violations of state law that only prohibit the appearance of corruption will not support a violation of §§1343 and 1346. 116 F.3d at 734. Thus, the Fifth Circuit requires more than just violating a duty to avoid a conflict of interest:

> If the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.

Id.

scope of the intangible rights doctrine. A decision from this Court would alleviate the confusion and serious notice problems that currently exist.

The Seventh Circuit's decision in this case also warrants review because it sets a troubling precedent by imposing criminal liability on a lawyer based on the alleged breach of a fiduciary duty imposed by a state code of professional ethics regardless whether harm to the client is contemplated. The court found that Hausmann misused his fiduciary relationship in violation of a Comment to a Wisconsin Supreme Court Rule of Professional Conduct for Attorneys which provides "[a] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest." Comment to WIS. SUP. CT. R. 20:1.7(b) (App. 1 at 7). The court relied on the Wisconsin code of conduct despite having previously indicated in *Bloom* that few violations of ethical duties are federal crimes. *Bloom*, 149 F.3d at 651.

The court's construction of §1346 offers prosecutors an intolerable level of discretion in deciding whether to bring charges against professionals for ethical violations. Any undisclosed conflict of interest that benefits the lawyer apparently is fair game for prosecutors. Under the court's decision, the referring lawyer must make a conflict-free referral and/or disclose any ulterior motive he may have for referring the client to a particular person. Professionals frequently refer clients to professionals in other fields based in part on personal reasons divorced from the question of who provides the best care. Referrals are made based on high school friendships, family connections, political affiliations, as a *quid pro quo* for referrals from

the other professional, out of admiration for the professional's volunteer work, or perhaps even based on an attraction to the other professional's sister. If the failure to disclose this conflict of interest constitutes an offense, then it also is an offense to fail to disclose any of these other ulterior motives when making a referral. Any undisclosed conflict of interest that arguably affects the lawyer's decision-making constitutes criminal fraud under the theory underlying this prosecution.

C. The Seventh Circuit's Decision Should Be Reversed.

A requirement that the defendant contemplated that his scheme would cause harm to someone else would at least confine the intangible rights doctrine to conduct which people generally understand as separating right from wrong. Absent a requirement of contemplated harm to the victim, disloyalty itself becomes the basis for criminal liability and "little remains before every civil wrong is potentially indictable." *Lemire*, 720 F.2d at 1336 n. 11. Here, the defendants were prosecuted for disloyalty itself, which makes this case a worthy candidate for review by this Court to consider whether to require proof of contemplated or reasonably foreseeable harm.

The referral arrangement did not harm the clients of HM medically, legally, or financially, and no such harm was anticipated by Hausmann and Rise. HM was retained to represent clients zealously in their personal injury cases and neither the government nor the lower court suggested that such representation did not occur. In part because HM referred many cases to MSIC, MSIC treated HM's clients well, was attentive to requests from the law firm,

provided free narrative reports to be used in negotiations with insurance companies, and treated patients who did not have insurance and could not pay up front. MSIC agreed to cuts in their fairly earned medical bills as well. These actions benefitted the clients legally and financially. The evidence was undisputed that MSIC provided excellent medical care and no one suggested that MSIC was less qualified than any other chiropractic clinic. In short, it made good sense for HM to refer clients to MSIC.

Under HM's retainer agreement, the clients were to receive two-thirds of the settlement out of which medical bills and other expenses would have to be paid. The clients received their two-thirds of the settlement and paid MSIC and others from the proceeds. MSIC's decisions regarding how to spend its money were none of the clients' business so long as MSIC had not overcharged them. There was no evidence or reason to believe that MSIC would have returned any portion of the 20% used for marketing and charity to clients or charged them less, absent the referral arrangement. MSIC charged patients who were not referred by HM the same and offered those patients no additional rebate. MSIC would have kept the money or perhaps used it for marketing. If referrals from HM had dried up, the money spent on charities and marketing with Hausmann would not even have paid for a full page ad in the yellow pages for the years 2000 and 2001.

The Seventh Circuit determined that Hausmann's clients were defrauded of "their right to know the truth about his compensation" (App. 1 at 8). While Hausmann's failure to disclose his interest in the payments to MSIC may have violated his professional ethics code, that violation should not be enough to find, in the absence of any tangible or foreseeable harm to the clients, that he,

and to a greater extent, Dr. Rise, a chiropractor not bound by that code, committed a federal crime.

The Seventh Circuit's decision is out of step with the other circuits to consider the issue and hastens the degeneration of §1346 into a common law crime by dangerously extending the reach of §1346. There is compelling reason for the Court to grant this Petition.

II. Section 1346 is Unconstitutionally Vague.

As discussed above, Congress's failure to define the "intangible right of honest services" has produced a plethora of conflicting circuit court opinions regarding the scope of the intangible rights doctrine. It has been pointed out that the terms "intangible rights" and "honest services" are not defined in the United States Code, are not defined in BLACK'S LAW DICTIONARY, and have never been used in the United States Code prior to their use in §1346. *Brumley*, 116 F.3d at 742 (Jolly, J., dissenting). The question arises whether any ordinary citizen could be expected to navigate through this thicket of patchwork case law to understand with sufficient definiteness what conduct is prohibited under 18 U.S.C. §§1341, 1343, and 1346. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). This Court should decide this important question of federal law.

As a matter of due process, a criminal statute must provide: "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *United States v. Lanier*, 520 U.S. 259, 265 (1997) (*quoting McBoyle v. United States*, 283 U.S. 25, 27 (1931)). The "vagueness doctrine bars enforcement of a 'statute which either forbids or

requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at 266 (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Thus, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

The void for vagueness doctrine is aimed not only at providing fair warning of what conduct is prohibited, but also at prohibiting arbitrary and erratic arrests and convictions. *E.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). A statute thus is unconstitutionally vague if it "encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender*, 461 U.S. at 361.

The Seventh Circuit held that its decision in *Bloom*, 149 F.3d at 655-56, placed Hausmann and Rise on notice that criminal liability under the intangible rights theory "attaches to the misuse of one's fiduciary position for personal gain" (App. 1 at 11). According to the court, Hausmann misused his fiduciary relationship by referring clients to an enterprise in which he had an undisclosed interest, in violation of the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys (App. 1 at 7). *Bloom* also emphasized, however, that not every breach of fiduciary duty or every conflict of interest works a criminal fraud, but the court's interpretation here does not bar the criminal prosecution for breaches of fiduciary duties or conflicts of interest so long as it can be argued that they personally gained in some way from their actions. In sum,

there was no notice that a conflict of interest in violation of the ethical rules would constitute a federal crime even absent any foreseeable harm to the client.

This theory sweeps too broadly, as lawyers are not on notice that a violation of a Wisconsin Supreme Court rule alone may subject them to criminal liability. The rules are intended only as guidelines, are often the subject of vigorous debate by lawyers as to their interpretation, and frequently leave much to the judgment of the individual lawyer. *See, e.g.*, Preamble to Wisconsin Supreme Court Rules of Professional Conduct for Attorneys ("Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."); *see also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Preamble and Scope (2002). "Fair warning" is not provided by reference to an ambiguous "rule of thumb" that has not previously been invoked as a basis for criminal liability.

The reliance on a violation of an ethical obligation is even more problematic where, as here, it ensnares a chiropractor who is not bound by the lawyer's ethical obligations or charged with knowing those obligations. It is one thing to charge citizens with the responsibility of knowing the criminal law, but quite another to assume their familiarity with the professional rules of conduct that guide occupations other than their own.[3] Even for an

---

[3] *Cf.* 1 LaFave & Scott, SUBSTANTIVE CRIMINAL LAW §2.3 at 129 & n. 28 (1986) (footnotes omitted):

> [I]f a penal statute is addressed to those in a particular trade or business, it is sufficient if the terms used have a meaning well enough defined to enable one engaged in that

(Continued on following page)

attorney, the provision relied upon by the government, Wisconsin Supreme Court Rule (SCR) 20:1.7(b), is too indefinite to support the imposition of criminal liability. For a chiropractor, it is the equivalent of no notice at all.

In *United States v. Handakas*, 286 F.3d 92 (2d Cir.), *cert. denied*, 537 U.S. 894 (2002), *overruled by United States v. Rybicki*, 2003 WL 23018917 (2d Cir. 2003) (in banc), the court held the "honest services" provision of the mail fraud statute void for vagueness as applied to a contractor who wilfully breached a contract he had with the New York City School Construction Authority (SCA). Although Handakas agreed in the contract to pay prevailing wage to his project workers on contracts with SCA, as required by state law, he paid his workers substantially less than prevailing wage and certified false payroll records asserting compliance with the requirement. The government's theory of prosecution in *Handakas* was that "'the SCA had a right to determine how its contracts would be fulfilled,' and that Handakas 'took away that right.'" *Id.* at 100. The court concluded that the statute was unconstitutionally vague because "[e]ven someone fully familiar with §§1341 and 1346, and our cases, would lack any comprehensible notice that federal law has criminalized breaches of contract." *Id.* at 107. The court also found that the statute as applied was sufficiently indefinite as to create the opportunity for the misuse of government power. *Id.*

---

trade or business to apply it correctly. It follows that a statute with uncertain language is more likely to be declared void for vagueness if it is addressed to the general public or to a substantial group of persons who have not voluntarily chosen to subject themselves to a particular regulatory scheme.

The Second Circuit recently held in *Rybicki*, 2003 WL 23018917, that §1346 is not unconstitutionally vague on its face or as applied. In doing so, the court overruled *Handakas*, finding that §1346 did not apply in that case because the defendant was not an employee of a private entity purporting to act in the interests of his employer. *Rybicki*, 2003 WL 23018917 at *13. The court did not overrule *Handakas* on its merits. Rather, it held that because there was "no reason to reach the constitutional question in *Handakas* . . . we overrule the unnecessary constitutional ruling in that case without reviewing it on its merits." *Id.*

Despite rejecting the constitutional challenge, *Rybicki* acknowledged that the court would have to "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services' simply by consulting a dictionary for the literal, 'plain' meaning of the phrase." *Id.* at *8. Nonetheless, the court determined that §1346 had a sufficiently "well-settled meaning" at the time that Congress enacted it in 1988 to withstand a vagueness challenge. The court recognized that in light of the divergence of circuit interpretations of §1346 there may be "a valid argument that the Supreme Court . . . should in an appropriate case seek to resolve inconsistencies in circuit analysis of section 1346." *Id.* at *12.

The four dissenters in *Rybicki*, 2003 WL 23018917 at *32, argued that §1346 was vague on its face and could not be saved by further judicial interpretation:

> [T]he vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge. The felt need

> to do that attests to the constitutional weakness of section 1346 as written. And the result of all these efforts – which has been to create different prohibitions and offenses in different circuits – confirms that the weakness is fatal. Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to "intentionally cause harm to another," or to "stray from the straight and narrow," or to fail to render "honest services."

A statute is unconstitutionally vague when it leaves juries free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. Section 1346, as applied to cases like this one, deprives the defendants of fair warning and raises the specter of arbitrary enforcement. Lawyers who represent the unpopular and the weak against the government, or against powerful institutions like insurance companies, may themselves become unpopular. Reliance upon the amorphous guidelines found in the Rules of Professional Conduct to impose criminal liability raises grave concerns about arbitrary enforcement. The Preamble to the Rules of Professional Conduct tries to bar such use by warning that the "purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons."

Given the divergent views of the circuits that have interpreted 18 U.S.C. §1346, the lack of statutory, judicial or other legal definition of §1346's key phrase, and the absence of any basis for charging Dr. Rise, a chiropractor, with notice of the professional rules governing lawyers in Wisconsin, §1346 is unconstitutionally vague as applied to Dr. Rise. He did not have, and could not have had, fair warning that his conduct was prohibited. The potential for

misuse of government power is great in this situation. Accordingly, this important issue of federal law provides a second compelling reason for this Court to grant the Petition.

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

Dated at Milwaukee, Wisconsin, January 26, 2004.

Respectfully submitted,

STEVEN M. GLYNN
CRAIG W. ALBEE
GLYNN, FITZGERALD & ALBEE, S.C.
526 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 221-9600

Attorneys for Petitioner

APPENDIX TABLE OF CONTENTS

Page

Description

Seventh Circuit Court of Appeals Opinion.....App. 1

District Court Order Denying pretrial motions (6/10/02).....App. 16

District Court Order denying motion for judgment of acquittal (6/10/02).....App. 19

District Court Order denying motion for arrest of judgment and judgment of acquittal (7/24/02).....App. 21

District Court's oral decision refusing requested defense instructions.....App. 23

District Court's oral decision overruling objections to scheme to defraud and intent to defraud instructions.....App. 26

Decision, Recommendations, and Orders Re: Defendants' Pretrial Motions (Magistrate Judge Opinion).....App. 33

Seventh Circuit Court of Appeals Order Denying Petition for Rehearing.....App. 68

Indictment.....App. 69

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 02-3945 & 02-3946

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES J. HAUSMANN and
SCOTT P. RISE,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 02 CR 10 –**Charles N. Clevert, Jr.**, *Judge*.

ARGUED APRIL 17, 2003 – SEPTEMBER 22, 2003

Before BAUER, MANION, and WILLIAMS, *Circuit Judges*.

BAUER, *Circuit Judge*. Charles P. Hausmann pleaded guilty to a charge of conspiracy to commit mail and wire fraud. A jury convicted Scott J. Rise of the same offense. Each defendant appeals from the district court's denial of his pretrial motion for dismissal of the indictment. Rise also challenges the district court's jury instructions and Hausmann appeals from his sentence based on his challenge to the district court's calculation of the loss amount attributable to the fraud. For the reasons set forth herein,

we affirm the decisions of the district court and, consequently, Hausmann's sentence and Rise's conviction.

BACKGROUND

Hausmann, a Milwaukee, Wisconsin, personal injury lawyer, referred certain of his clients to Rise, a chiropractor, for chiropractic services paid from insurance settlement proceeds, in return for which Rise made corresponding payments, equal to twenty percent of the fees he collected for those services, to third-party recipients at Hausmann's direction. Recipients included (i) individuals who had provided miscellaneous personal services to Hausmann or his relatives, (ii) a marketing firm providing services at Hausmann's direction, (iii) business entities (or their agents) in which Hausmann held some interest, and (iv) charities that Hausmann supported.[1] Between October 1999 and June 2001, these payments totaled $77,062.87. Hausmann did not disclose this kickback arrangement to his clients, ordinarily victims of automobile accidents. The typical client signed a retainer agreement providing that, in exchange for the services of Hausmann's law firm, Hausmann-McNally,

[1] For example, Rise paid (i) a total of $31,692.00 to a marketing firm with whom Hausmann, but not Rise, contracted to market the services of lawyers and chiropractors as part of a planned "Accident Care Network"; (ii) at least $2000, nominally to a charity, but effectively as consideration for landscaping work performed at Hausmann's residence; (iii) a total of $14,900 to a full-time handyman who provided services at Hausmann's direction to Hausmann's firm, Rise's practice, Hausmann personally, a business jointly owned by Hausmann and his law partner in their individual capacities, and Hausmann's sister; and (iv) $850 to a company that refinished the wood floors of a contract employee involved in Hausmann's marketing project.

S.C., he or she would pay the firm one third of "whatever total sum is collected." The standard agreement also provided as follows:

> The client further authorizes his attorney to pay medical and other bills incurred as a result of this accident directly to the doctors and hospitals. *It is further understood and agreed that said money to pay these bills shall come from the client's portion of the settlement.*

(Emphasis in original).

In January 2002, Hausmann and Rise were indicted on charges of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 371.[2] Both defendants moved for pretrial dismissal of the indictment, which they argued failed to allege a criminal offense or the essential elements thereof. The motions were heard by a magistrate judge, upon whose recommendation the district court denied them. Hausmann then entered a conditional plea of guilty on the conspiracy charge, preserving his right to appeal the denial of his motion to dismiss.

A jury convicted Rise of the conspiracy charge. At Rise's trial, his former employee testified that Rise used the term "kickback" to describe the payments. Rise filed unavailing motions for a judgment of acquittal and for arrest of judgment. The district court sentenced Hausmann and

---

[2] Hausmann was additionally charged with causing securities (kickback payment checks written by Rise) to be transferred in interstate commerce in connection with the fraud, in violation of 18 U.S.C. §§ 2314 & 2, but this count was dismissed pursuant to a plea agreement.

Rise each to sixty-day terms of imprisonment (stayed pending the disposition of this appeal) and twelve-month terms of supervised release, and ordered them to pay restitution in the joint and several amount of $77,062.87.

This appeal ensued.

ANALYSIS

I. Sufficiency of the Indictment and Evidence of Rise's Guilt

Appellants challenge the sufficiency of the indictment, asserting that it fails adequately to allege the elements of the underlying mail and wire fraud offense. Rise further argues that the government failed to prove the aforementioned elements and that, consequently, the district court improperly denied his motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

We review de novo both the sufficiency of a criminal indictment, *see, e.g.*, *United States v. Irorere,* 228 F.3d 814, 830 (7th Cir. 2000), and the denial of a motion for judgment of acquittal, *see, e.g.*, *United States v. Jones,* 222 F.3d 349, 351 (7th Cir. 2000). A valid indictment must (i) state each element of the alleged offense, (ii) provide the defendant with information adequate for the preparation of his defense, and (iii) provide sufficient basis for a judgment that would bar any subsequent prosecution for the same offense. *See* FED. R. CRIM. P. 7(c); *United States v. Allender,* 62 F.3d 909, 914 (7th Cir. 1995). "The test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *Allender,* 62 F.3d at

914. Denial of a motion for judgment of acquittal is appropriate unless "the evidence is insufficient to sustain a conviction," FED. R. CRIM. P. 29(a). "In considering the sufficiency of the evidence, we review it in the light most favorable to the prosecution, and as long as any rational jury could have returned a guilty verdict, the verdict must stand." *Jones,* 222 F.3d at 352 (internal citations omitted).

Rise's appeal from the denial of his motion for judgment of acquittal is duplicative of Appellants' challenge to the sufficiency of the indictment. Both theories allege that the government failed to allege or prove, respectively, the following purported elements of the mail and wire fraud offenses underlying the conspiracy charge: (i) actual or foreseeable harm to Hausmann's clients; (ii) Hausmann's fiduciary duty in excess of that memorialized in the retainer agreements; (iii) that Hausmann's conflict of interest adversely affected his clients; (iv) intent to defraud; (v) the materiality of the nondisclosure to clients of the scheme; and (vi) the scheme's interstate jurisdictional nexus.

Where "two or more persons conspire . . . to commit any offense" under Title XVIII of the United States Code "one or more of such persons [who commit] any act to effect the object of the conspiracy" may be held criminally liable therefor under 18 U.S.C. § 371. It is a violation of 18 U.S.C. §§ 1341, 1543, and 1346 to use the United States Postal Service, a private interstate courier, or an interstate wire communications service in order to implement a "scheme or artifice to defraud [by depriving] another of the intangible right of honest services." 18 U.S.C. § 1346. Despite our doubts as to the applicability of these "intangible-rights theory" provisions of the mail and wire fraud statutes to cases of breach of fiduciary duty with nothing

more, this Court has suggested that liability under this theory may nonetheless result where a defendant misuses his fiduciary relationship (or information acquired therefrom) for personal gain. *See United States v. Bloom,* 149 F.3d 649, 655-56 (7th Cir. 1999). We have held, moreover, that an employee's undisclosed derivation of profits from business he transacted on his employer's behalf amounted to a deprivation of the employer's intangible right to honest services in violation of 18 U.S.C. §§ 1341 and 1346. *United States v. Montani,* 204 F.3d 761, 768-69 (7th Cir. 2000). Accordingly, under the intangible-rights theory of federal mail or wire fraud liability, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed.

Here, the indictment clearly and correctly stated the fiduciary relationship between Hausmann and his clients:

> During the time period of the scheme, Hausmann-McNally, S.C., including defendant Hausmann and other agents and employees under his direction, owed a fiduciary duty to the clients of the law firm, . . . [including] the obligation of Haussman-McNally to disclose to the client any financial interest that the law firm may have involving the representation; to advise the client in a conflict-free manner; . . . to negotiate in the best interest of the client[; and] *to provide accurate and complete information to the clients regarding the financial terms of personal injury case settlements, as well as the amount of compensation taken by the lawyers involved in the case.*

(Emphasis added). Furthermore, at Rise's trial, the government presented the testimony of Hausmann's law partner, John McNally, describing the clients' dependence upon legal representation by the firm in order to settle their claims, as well as testimony from several clients describing Hausmann's written representations regarding their settlements and the firm's compensation and the reliance they placed thereupon.

The Wisconsin Supreme Court Rules of Professional Conduct for Attorneys provide that "[a] lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest." Comment to WIS. SUP. CT. R. 20:1.7(b). Thus, the indictment's statement that "[t]he kickback arrangement was concealed from the clients of Hausmann-McNally in violation of the fiduciary duty described above" clearly alleges Hausmann's misuse of the fiduciary relationship. Testimony of clients that were unaware of the kickback scheme served as evidence at Rise's trial of the misuse of the fiduciary relationship.

The indictment also clearly alleged, and the government demonstrated at Rise's trial, that Hausmann gained over $70,000 in kickback payments made to third parties for his personal benefit or entities in which he had some interest, including, for example, "at least $2000 in landscaping improvements performed at Hausmann's personal residence," and that such concealed payments deprived clients of the intangible right of honest services. At trial, for example, the government produced evidence that Rise signed a check in the amount of $1000 as a direct payment for such landscaping work.

Appellants contend that Rise's third-party payments were not kickbacks, but rather constituted the legitimate spending of income derived from use of fees to which Rise was legally entitled. They maintain that Hausmann's clients had no right to the settlement funds paid to Rise nor, consequently, to the allocation of twenty percent of those funds to expenditures designated by Hausmann. In this sense, reason Appellants, no harm resulted to Hausmann's clients, who were deprived of nothing to which they were entitled. This reasoning ignores the reality that Hausmann deprived his clients of their right to know the truth about his compensation: In addition to one third of any settlement proceeds he negotiated on their behalf, every dollar of Rise's effective twenty percent fee discount went to Hausmann's benefit. Insofar as Hausmann misrepresented this compensation, that discount should have inured to the benefit of his clients. It is of no consequence, despite Appellants' arguments to the contrary, that Rise's fees (absent his discount) were competitive, or that clients received the same net benefit as they would have absent the kickback scheme. The scheme itself converted Hausmann's representations to his clients into misrepresentations, and Hausmann illegally profited at the expense of his clients, who were entitled to his honest services as well as their contractually bargained-for portion of Rise's discount.

Appellants also contend that the indictment did not properly allege their use of the interstate mails or wire communications systems in furtherance of the kickback scheme. However, the indictment plainly states that Appellants,

> and others acting on their behalf, for the purpose of executing and attempting to execute a scheme

> to defraud: (a) did cause and intend to cause matter to be delivered by the United States Postal Service and commercial interstate carrier according to the directions thereon . . . ; and (b) did cause or intend to cause sounds to be transmitted in interstate commerce by means of wire communications. . . . The matter included: (a) solicitations and communications from Hausmann-McNally to clients; (b) communications between Hausmann-McNally lawyers and [Rise's clinic] regarding billings; and (c) communications between Hausmann and certain recipients of the kickback checks. The interstate wire communications included telephone calls, facsimiles and emails between Hausmann and certain recipients of the kickback checks; and telephone calls from Hausmann to others regarding the flow of kickback payments.

The indictment thus sufficiently alleges the interstate element of Appellants' conspiracy to commit mail and wire fraud.

Finally, Rise challenges his culpability based on his lack of awareness that Hausmann was defrauding his clients. However, the knowing payer of an illegal kickback is criminally liable for conspiracy to commit mail or wire fraud to the same extent as the recipient of such a payment. *See, e.g., United States v. Alexander,* 741 F.2d 962, 964 (7th Cir. 1984), overruled on other grounds by *United States v. Ginsburg,* 773 F.2d 798, 802 (7th Cir. 1985). Insofar as Rise knowingly signed checks payable to third-party recipients (in order to conceal the scheme) equal in total amount to twenty percent of the fees he collected in connection with referrals from Hausmann, Rise acted in furtherance of the conspiracy to defraud the clients. His guilt as a co-conspirator is clear.

For all of these reasons, the indictment sufficiently alleges the elements of the mail and wire fraud offenses underlying the conspiracy charge against Appellants: that Hausmann used the required interstate means in order to misuse his fiduciary relationship for his gain and at his clients' expense. Furthermore, we find that a rational jury could have found Rise guilty based upon the evidence produced at his trial.

II. Constitutionality of the Application of the Mail and Wire Fraud States to Appellants' Conduct

Appellants further challenge the constitutionality of the application of 18 U.S.C. §§ 1341, 1343, and 1346 as void for vagueness and based on principles of federalism. The constitutionality of a federal statute is an issue of law subject to de novo review.

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of ordinary notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)). Appellants claim both, that the mail and wire fraud statutes did not provide them with adequate notice of the criminality of their kickback scheme, and that application of the mail and wire fraud statutes to the facts of this case invites the government arbitrarily to police the fairness of private business transactions through enforcement of criminal statutes. With respect to the first of these

two arguments, this Court's decision in Bloom,[3] placed Appellants on notice that criminal liability under the mail and wire fraud statutes – particularly under an intangible-rights theory – attaches to the misuse of one's fiduciary position for personal gain. *See* 149 F.3d at 655-56. With respect to the second, the existence of Hausmann's fiduciary duty owed to his clients distinguishes this case from one where the government arbitrarily and impermissibly relies upon the mail and wire fraud statutes to enforce merely the terms of a private contract. *Cf. United States v. Handakas,* 286 F.3d 92, 107 (2d Cir. 2002) (refusing to expand the application of 18 U.S.C. § 1346 and thereby render "[e]very breach of a contract or state law . . . punishable as a felony in federal court"). We therefore find that the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1346, are not unconstitutionally vague, as applied under the intangible-rights theory to a kickback scheme enabled by the offender's misuse of his fiduciary position gain.

Appellants further contend that the indictment violates principles of federalism because it "overreaches" the scope of the federal criminal law by criminalizing conduct which is regulated by state law. Unlike the cases that Appellants cite for this proposition, such as *Handakas,* 286 F.3d 92 (misrepresentations by defendant contractor violated state wage laws); *Cleveland v. United States,* 531 U.S. 12 (2000) (defendants made false statements in state gaming license applications); and *United States v. Lopez,* 514 U.S. 549 (1995) (invalidating Gun-Free School

[3] *Bloom* was decided in July 1998, more than one year prior to the alleged commencement of the kickback scheme.

Zones Act of 1990 as insufficiently related to regulation of interstate commerce); in which federalization of state laws or state regulated conduct was held unconstitutional, this case casts no meaningful doubt on Congress's authority to regulate use of the interstate mails and wire communications systems in furtherance of fraudulent conduct.[4] The indictment alleged such use of the interstate mail and wire communications systems, including an allegation that kickback payment checks were mailed out of state.[5] Moreover, as the magistrate judge aptly noted in his recommendation to deny Appellants' motions to dismiss the indictment, "[w]ithout some showing that either the statutes in question or the prosecution of this case contravene some specific rule of constitutional or statutory law, the mere fact that the conduct in question is of a sort traditionally dealt with through state law cannot serve as a basis for dismissing [the] indictment." Appellants have made no such showing, and we are unpersuaded by the argument.

III. Jury Instructions

As an alternative basis for appealing his conviction, Rise claims that the district court failed to instruct the jury that, in order to convict him, it must find that (i) Rise reasonably contemplated harm to Hausmann's clients and

---

[4] This authority is established in the Postal Power of Article I, Section 8, Clause 7 of the Constitution. *See also United States v. Elliott*, 89 F.3d 1360, 1363-64 (8th Cir.1996).

[5] Although this allegation related to a charge that was dismissed pursuant to Hausmann's plea agreement, evidence that checks were mailed out of state was presented at Rise's trial.

(ii) the scheme was intended not only as a gain to Hausmann, but also a loss to his clients. Here, Rise alleges an error of law in the jury instructions, which we review de novo.

The district court instructed the jury, in relevant part, as follows:

> To find that there existed a scheme to deprive one or more clients of the Hausmann-McNally law firm of his or her right to the honest services of that firm you must find beyond a reasonable doubt, first, that a fiduciary relationship existed between one or more of the clients of the Hausmann-McNally firm. Second, that Scott Rise and Charles Hausmann knowingly engaged in a scheme to deprive one or more clients of the Hausmann-McNally law firm of the right to honest services of the Hausmann-McNally law firm as charged in Count 1. And, third, that through such scheme, Charles Hausmann misused his fiduciary relationship with one or more clients of the Hausmann-McNally law firm for personal gain.

This instruction adequately and accurately communicates the elements of Rise's offense. There is no requirement under the law as articulated in *Bloom* and reiterated today that a co-conspirator to a wire and mail fraud scheme contemplate actual or foreseeable harm to the victim. Also, though the law does not require the court to instruct a jury that the scheme is intended to cause a loss to the victims *as well as* a gain to the offender, the loss element is implicit in the district court's references both to a deprivation of one or more clients' right to honest services – a type of loss in and of itself – and to Hausmann's gain. As discussed above, once Rise opted to discount his

fees for chiropractic services, Hausmann's clients shared Rise's economic loss – a corollary to their entitlement to a portion of Hausmann's gain. Finding no error in the district court's instruction of the jury that convicted him, we reject Rise's jury instruction claim.

IV. Loss Amount

Lastly, Hausmann challenges the district court's calculation of the amount of loss caused to the victims of Appellants' scheme. Specifically, he argues that the court erred in refusing to reduce the value of the loss by the amount of "valuable free services" and fee reductions that Hausmann-McNally provided to clients. He asserts that these services and reductions totaled $238,993.66, a figure exceeding the district court's calculated loss amount of $77,062.87, based upon the aggregate value of the kick-backs, and insists, therefore, that his clients received a net benefit as a result of his representation.

The United States Sentencing Guidelines provide that any amount of loss "shall be reduced by the money returned, and the fair market value of the property returned and the services rendered by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." U.S.S.G. § 2B1.1, Application Note 2(A)(i). Hausmann correctly notes that this Circuit has adopted a "credit against loss" approach to the calculation of fraud victim loss amounts for sentencing guideline purposes. *See, e.g., United States v. Jackson,* 95 F.3d 500, 506 (7th Cir. 2000) (Sentencing Guidelines "call for the court to determine the net detriment to the victim, rather than the gross amount of money that changes hands"). However, that approach is inapplicable to these

facts. The free services and reductions that the firm provided to the victims were services routinely provided to *all* Hausmann-McNally clients, not just those who were defrauded. Thus, the relevant inquiry is whether those services and reductions lessened the net detriment to victims of the fraud relative to other clients of the firm who were not victims. They did not, for which reason the district court properly declined to credit their value against the total amount of the kickback payments.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 02-CR-010

CHARLES J. HAUSMANN and
SCOTT P. RISE,

Defendants.

ORDER DENYING MOTION TO DISMISS COUNT 1 OF THE INDICTMENT FOR FAILURE TO ALLEGE ESSENTIAL ELEMENT [INTENT TO DEFRAUD] (DOC. #13); DENYING MOTION TO DISMISS THE INDICTMENT PURSUANT TO FED. R. CRIM. P. 12(b)(2) (DOC. #14 & 18); WITHDRAWING DEFENDANT HAUSMANN'S MOTIONS IN LIMINE (DOCS. #36, 37, 38, 39 & 41); WITHDRAWING DEFENDANT RISE'S MOTION IN LIMINE (DOC. #47) AND GRANTING GOVERNMENT'S MOTION TO ADMIT CYD RECORDS (DOC. #49)

(Filed Jun. 10, 2002)

This case came before the court for the pretrial hearing on May 30, 2002. Appearing for defendant Charles J. Hausman [sic] were attorneys David J. Cannon, John Busch, and James Thomas. Appearing for defendant Scott P. Rise were attorneys Stephen Glynn and Craig Albee. Appearing for the United States was United States Attorney Steven Biskupic.

As a consequence, the court has considered the defendants objections to the Magistrate Judge's recommendation April 17, 2002, and motions in limine discussed below.

For the reasons set forth on the record of the May 30, 2002, hearing, as well as the reasons set forth on the record at the telephonic conference in this case on May 31, 2002, the court will adopt Magistrate Judge Callahan's well-reasoned recommendations of April 17, 2002.

Defendant Hausmann submitted five motions in limine. The first sought to preclude the admission of expert testimony consisting of legal conclusions. The second sought to preclude the Government from characterizing the alleged actions of the defendants as a "kickback" scheme. The third sought to preclude the government from presenting evidence or arguments respecting the financial status of the defendants claiming that such evidence is unfairly prejudicial. The fourth sought to preclude the Government from introducing certain statements. The fifth sought to strike the testimony of Howard Eisenberg as expert legal testimony. Subsequently, Hausmann asked that these motions be withdrawn.

Rise filed one motion in limine, seeking to preclude the admission of five specific pieces of evidence. These include the alleged billing for surgical trays or other upcoding of services, the contents of use immunity letters sent by the Government to witnesses, the tape from an answering machine message provided by an investigator for Hausmann-McNally, S.C., the diary of a government witness, and the handwritten notes of another doctor summarizing claims against Dr. Rise and his clinic. The Government agreed that it will not present evidence regarding surgical trays or upcoding; it will not seek to introduce immunity letters; and it will not introduce the additional evidence addressed by Rise's motion in limine. Accordingly, Rise asked that his motions be withdrawn.

Finally, the Government submitted a motion in limine to admit certain records of CYD, a charity with which defendant Hausmann had dealings during the period covered by the indictment. At the May 31, 2002, telephonic hearing, the defendants stated that they did not oppose this motion.

Therefore,

IT IS ORDERED that the defendant's motion to dismiss Count 1 of the indictment for failure to allege essential element [intent to defraud] (Doc. #13) is DENIED.

IT IS FURTHER ORDERED that the defendant's motions to dismiss the indictment pursuant to Fed. R. Crim. P. 12(b)(2) for failure to allege a criminal offense, as unconstitutionally vague, and as contrary to the principles of federalism (Doc. #14 & 18) are DENIED.

IT IS FURTHER ORDERED that defendant Charles J. Hausmann's motions in limine (Docs. #36, 37, 38, 39 & 41) are withdrawn.

IT IS FURTHER ORDERED that defendant Scott P. Rise's motion in limine (Doc. #47) is withdrawn.

IT IS FURTHER ORDERED that plaintiff United States' motion to admit CYD records (Doc. #49) is GRANTED.

Dated at Milwaukee, Wisconsin, this 10th day of June, 2002. Nunc pro tunc May 31, 2002.

BY THE COURT

/s/ C. N. Clevert
C. N. CLEVERT
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 02-CR-010

CHARLES J. HAUSMANN and
SCOTT P. RISE,

Defendants.

DECISION AND ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

(Doc. #56)

(Filed Jun. 10, 2002)

The court has considered the motion of defendant Scott Rise for judgment of Acquittal. Viewing the evidence in the light most favorable to the government, the court has determined that a rational jury could find beyond a reasonable doubt that Rise is guilty. Accordingly,

IT IS ORDERED that the defendant Scott P. Rise's motion for judgment of acquittal (Doc. #356) is denied.

Dated at Milwaukee, Wisconsin, this 10th day of June, 2002.

BY THE COURT

/s/ C. N. Clevert
C. N. CLEVERT
U. S. District Judge

This 10th day of June, 2002, pursuant to Rule 49(c) Federal Rules of Criminal Procedure, copies of this document were mailed by M. Jones to the following parties:

Attorney Stephen M. Glynn
Glynn Fitzgerald & Albee
526 E. Wisconsin Ave.
Milwaukee, WI 53202-4503

Steven M. Biskupic
U. S. Attorney
517 E. Wisconsin Ave., Room 532
Milwaukee, WI 53202

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 02-CR-010

CHARLES J. HAUSMANN and
SCOTT P. RISE,

Defendants.

DECISION AND ORDER DENYING MOTION FOR ARREST OF JUDGMENT (DOC. #72) AND JUDGMENT OF ACQUITTAL (DOC. #73)

(Filed Jul. 24, 2002)

Defendant Scott Rise has filed two post-verdict motions: a motion for arrest of judgment, claiming the indictment fails to state an offense; and a motion for judgment of acquittal, as the evidence at trial was insufficient to support his conviction. Previously, Rise filed a motion to dismiss the indictment for failure to charge an offense, which was denied.

For the reasons set forth in this court's Order of June 10, 2002, the motion to dismiss the indictment for failure to charge an offense cannot be granted. Furthermore, viewing the evidence in the light most favorable to the government, the court has determined that a rational jury could find beyond a reasonable doubt that Rise is guilty. Accordingly,

IT IS ORDERED that the defendant Scott P. Rise's motion for arrest of judgment (Doc. #372) is **DENIED**.

IT IS FURTHER ORDERED that the defendant Scott P. Rise's motion for judgment of acquittal (Doc. #73) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 24th day of July, 2002.

BY THE COURT

/s/ C. N. Clevert
C. N. CLEVERT
U. S. District Judge

This 25th day of July, 2002, pursuant to Rule 49(c) Federal Rules of Criminal Procedure, copies of this document were mailed by M. Jones to the following parties:

Attorney Stephen M. Glynn
Glynn Fitzgerald & Albee
526 E. Wisconsin Ave.
Milwaukee, WI 53202-4503

AUSA Steven M. Biskupic
U. S. Attorney's Office
517 E. Wisconsin Ave., Room 532
Milwaukee, WI 53202

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	CASE NO. 02-CR-10
v.	)	
SCOTT P. RISE,	)	
Defendant	)	VOLUME 6

HONORABLE CHARLES N. CLEVERT
PRESIDING DISTRICT COURT JUDGE
MILWAUKEE, WISCONSIN JUNE 7, 2002

PROCEEDINGS

HELD IN THE ABOVE-ENTITLED JURY TRIAL

APPEARANCES:

STEVEN M. BISKUPIC and SCOTT CAMPBELL, U.S. Attorney's Office, 517 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Plaintiff.

STEPHEN M. GLYNN and CRAIG ALBEE, Glynn, Fitzgerald & Albee, 526 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Defendant.

* * *

[614] the instructions given regarding fiduciary duties and make clear to the jury and appropriately clear that simply because a lawyer receives something of value that that in and of itself is the basis for finding a breach of fiduciary duty.

And I, and we had submitted a theory of defense instruction. I believe that an adequate record was made on Friday on that. And that's all, Your Honor. Thank you.

THE COURT: Does the government wish to comment further on the instructions which we just reviewed by the defense?

MR. CAMPBELL: Just two comments, Judge. First, in opposing these instructions in which the defense just alluded the government rests upon its previous arguments.

With regard particularly, though, to requested defense instruction number 35, I note that by its own language it addresses ethical provisions, not fiduciary duties. And our entire discussion on this instruction focused on the language of the instruction. We had not, the defendant's attempt to now kind of modify this to address fiduciary duties, I think, is late in the game. But even if the court were to consider it as addressing fiduciary responsibilities, it's unnecessary.

THE COURT: The Court has ruled previously that these instructions would be rejected for a variety of reasons cited on the record and the court is maintaining its position with [615] respect to rejecting these instructions except as otherwise noted in instructions that are to be given.

At this point I would like to bring out the jury. The bailiff please check to see whether everyone is ready to come out.

(The following proceedings were held in the presence of the jury.)

THE COURT: Good morning, everyone. I want to give you some additional instructions. And the first instruction is to be sure to look at your instructions notebooks which will be sent to you shortly. The Court has modified to some minor degree a few of the instructions and, therefore, you should be guided by the instructions as set forth in writing in your notebooks.

I do want to emphasize that you are to read and consider and use the instructions as a whole and in that way be guided during the course of your deliberation.

When you return to the jury room there are some things that you will need to do. But before that I do want to dismiss our alternate. Juror number six is dismissed at this time. Only twelve jurors may deliberate in this case. I do want to let you know that the government, the defense and the Court thank you for your jury service. It will not be necessary for you to remain and hear the last instruction. So juror number [illegible], you may return to the jury room, gather your

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	CASE NO. 02-CR-10
v.	)	
SCOTT P. RISE,	)	
Defendant.	)	VOLUME 8

HONORABLE CHARLES N. CLEVERT
PRESIDING DISTRICT COURT JUDGE
MILWAUKEE, WISCONSIN JUNE 10, 2002

PROCEEDINGS

HELD IN THE ABOVE-ENTITLED JURY TRIAL

APPEARANCES:

STEVEN M. BISKUPIC and SCOTT CAMPBELL, U.S. Attorney's Office, 517 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Plaintiff.

STEPHEN M. GLYNN and CRAIG ALBEE, Glynn, Fitzgerald & Albee, 526 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Defendant.

* * *

[500] don't think that should be there. The problem is that under this instruction criminal liability could be found based on a scheme that is intended to deceive or cheat another and to obtain money or property. And under Walters –

THE COURT: It doesn't say and –

MR. ALBEE: And to obtain money or property.

THE COURT: Yeah.

MR. ALBEE: But it doesn't require under that prong that there be a deprivation of property from the client.

And if the court will recall in Walters where it was the student athletes on scholarship, Walters intended to obtain money and he intended to cheat, but he didn't intend to deprive the university of any money.

And if you follow this instruction you could find Walters guilty, and the Seventh Circuit has said you cannot. And that's my objection.

THE COURT: Mr. Campbell?

MR. CAMPBELL: The government's response, Judge, is that the victim of the scheme to defraud is not an element of the defense and, therefore, that the instruction is complete as given.

THE COURT: As we discussed last night the court believes this instruction is an accurate statement of the [501] law. We went through a substantial discussion of these issues insofar as the defendant's motions – I should say motion to dismiss the indictment was concerned.

This is essentially a rehash of the argument you've advanced in your request that the indictment be dismissed. And the court respectfully disagreed with that, and as a consequence it would be inappropriate to include that as part of this particular instruction.

Is there another objection?

MR. ALBEE: The last two sentences in that same paragraph, Your Honor, which is intended to impose the unanimity requirement.

The deficiency in these sentences is that it concludes: However, that you must unanimously agree that the scheme was intended to achieve at least one of these particular purposes.

I don't think that the language requires that all 12 jurors agree that it be one particular purpose. That is, I think this still would permit them – six of them to say it was one purpose and six to say it was another.

And in my instruction, I think it was 16A, there is language incorporating I think fully the unanimity requirement that I think is –

THE COURT: I understand your point. I strongly

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	)	CASE NO. 02-CR-10
v.	)	
SCOTT P. RISE, Defendant.	)	VOLUME 6

HONORABLE CHARLES N. CLEVERT
PRESIDING DISTRICT COURT JUDGE
MILWAUKEE, WISCONSIN JUNE 7, 2002

PROCEEDINGS

HELD IN THE ABOVE-ENTITLED JURY TRIAL

APPEARANCES:

STEVEN M. BISKUPIC and SCOTT CAMPBELL, U.S. Attorney's Office, 517 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Plaintiff.

STEPHEN M. GLYNN and CRAIG ALBEE, Glynn, Fitzgerald & Albee, 526 E. Wisconsin Ave., Milwaukee, WI 53202, appearing for the Defendant.

* * *

[584] And we would have no objection to the addition of some language capturing that notion.

THE COURT: I was trying to get my information out. Is there another?

MR. ALBEE: The next instruction would be instruction 19. I believe I put this objection on the record on Friday but I do want to make sure that, and that I believe that the definition of scheme to defraud as set forth in the third paragraph of instruction 19 allows conviction based solely on cheating someone to gain money. And I do not believe that that is enough and I cite Walters principally for that proposition. That is, I don't think it's the law that simply because you cheat someone and you hope to gain money from it that that meets the requirements of scheme to defraud.

The other objection, well, that one I know is on the record. So I do just again want to emphasize I do not believe that it's enough to cheat someone to gain money. I think it must be somewhat required that you anticipate the possible loss at least of money or property to the alleged victim.

THE COURT: Do you wish to comment further on that, Mr. Campbell?

MR. CAMPBELL: No, Your Honor. The government rests on its previous arguments but just notes for the record that the government consistently maintained that the instruction does accurately state the law, does correctly state the law.

[585] The government does, however, have one unrelated suggested change to this instruction. And that is in the final paragraph a comma is needed between the words "pretense" and "representation."

THE COURT: For whatever reason the copy I have has a comma.

MR. CAMPBELL: Oh, gosh, okay. Mine doesn't. Sorry.

THE COURT: And the word "or" in the line above has been changed to "on."

MR. CAMPBELL: Thank you, Judge.

MR. ALBEE: Judge, I think Mr. Campbell is talking about the first line of that paragraph. Mine doesn't have a comma either.

THE COURT: Oh, yes, you're right. That is correct. Is there another?

MR. ALBEE: Yes. Instruction number 20, Your Honor. This instruction relating to what constitutes depravation of client's rights to attorney's honest services was the subject of considerable discussion during our lengthy in chambers conference on Thursday. Also was the subject of some discussion on Friday. We had submitted and I'll get our instructions later, but we have submitted some alternative instructions relating to the requirements of fiduciary relationship that I think more accurately stated the law.

I think that this instruction that the government

* * *

[589] honest services.

THE COURT: Well, I certainly note that the second phrase in the third paragraph discusses knowledge, that is, the knowledge of Scott Rise and Charles Hausmann to engage in a scheme to deprive clients of their right to honest services of the Hausmann McNally law firm as charged in Count 1. It seems to me that the

knowledge element is, therefore, obvious and set forth for jury consideration. And so I do believe that this instruction meets the requirements of law.

Do you have another objection, Mr. Albee?

MR. ALBEE: Yes, Your Honor. Instruction 26, intent to defraud. The intent to defraud instruction suffers from the same deficiency in my view as the scheme to defraud instruction suffered from, which is that it permits a finding of intent to defraud based solely on an intent to deceive the clients for the purpose of financial gain by either the defendant or Mr. Hausmann without any intentional loss necessarily to the clients themselves. And, again, under Walters I think this is insufficient.

THE COURT: The same ruling applies here. I do believe we've gone over Walters several times and we are in disagreement regarding how it applies here or whether it applies here.

MR. ALBEE: Judge, then what I'd like to, those are all the objections that I have.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 02-CR-10

CHARLES J. HAUSMANN and
SCOTT P. RISE,

Defendants.

DECISION, RECOMMENDATIONS, AND ORDERS RE: DEFENDANTS' PRETRIAL MOTIONS

(Filed Apr. 17, 2002)

I. BACKGROUND

On January 8, 2002, a federal grand jury sitting in the Eastern District of Wisconsin handed down a two count indictment in the above-entitled action. In count one of the indictment, the defendants are charged with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and 2. In the indictment's second count, defendant Charles J. Hausmann ("Hausmann") is charged with violating 18 U.S.C. §§ 2314 and 2 by knowingly causing in excess of $5,000 in securities to be transferred in interstate commerce knowing the securities to have been converted and taken by means of the fraud charged in count one.

The largest part of the indictment is devoted to describing the fraudulent scheme allegedly devised and operated by the defendants. According to the indictment,

Hausmann, an attorney with the firm Hausmann-McNally, S.C., and Scott P. Rise ("Rise"), an owner and operator of the chiropractic clinic Milwaukee Spinal Injury Center ("MSIC") engaged, in a kickback scheme. Under the alleged scheme, Rise (on behalf of MSIC) paid Hausmann a kickback in an amount equal to approximately twenty percent of the medical bills for the clients Hausmann referred to MSIC. During the course of the alleged scheme to defraud, Hausmann referred approximately 200 clients to MSIC. MSIC was paid more than $350,000 as a result of those clients' insurance settlements. Hausmann's twenty percent kickback therefore netted him $70,000. The payment arrangement between Hausmann and Rise was concealed from Hausmann's clients and law partner.

Hausmann has filed a motion to dismiss the indictment; Rise has filed a motion to adopt a section of Hausmann's supporting brief. Rise has filed two motions to dismiss count one of the indictment, one on the grounds that the indictment fails to state an offense and one on the grounds that the indictment fails to allege intent to defraud; Hausmann has moved to adopt these motions. Rise has also filed a motion to preserve and disclose agents' notes which Hausmann has moved to join. Each defendant has also filed a request for pretrial disclosure of (1) any evidence that the government intends to introduce pursuant to Fed. R. Evid. 404(b) and 807, and (2) all information and documents falling within the scope of Fed. R. Crim. P. 16(a). Finally, Rise has filed a motion for a bill of particulars.

II. ANALYSIS

A. Motions to Adopt

The defendants have represented that granting their motions to adopt will prevent unnecessary duplication of effort by the parties. Further, Hausmann has represented that the parties have conferred and that neither objects to the other party's adopting his motions.

The standard pretrial order issued by this court in criminal cases includes the following language: "No motions to adopt or join in a motion of a co-defendant will be permitted without prior approval of the court for good cause shown." This fairly recent modification of the court's standing pretrial order was made in an effort to, among other things, insure that each defendant in a multi-defendant case only seeks to adopt those motions of his co-defendants that he genuinely has standing to adopt. It also guards against a defendant who has moved to adopt the motion of a co-defendant having his motion denied, as moot, in the circumstance where his co-defendant withdraws the particular adopted motion because the co-defendant has decided to plead guilty.

Based on the representations of the parties, through their counsel, and for good cause shown, the defendants' motions to adopt are granted.

B. Motions to Dismiss the Indictment

Brought pursuant to Fed. R. Crim. P. 12(b),[1] the defendants'[2] motions to dismiss the indictment challenge the charging instrument on several grounds. With respect to count one, the defendants object (1) that the indictment fails to adequately set forth the offenses charged, (2) that the statute under which the defendants are being prosecuted is unconstitutionally vague, and (3) that this prosecution violates principles of federalism. Hausmann also contends that count two must be dismissed, since it assumes the validity of count one. Finally, Rise argues that count one of the indictment fails to sufficiently allege either conduct or the requisite mental state with respect to his involvement in the conspiracy that has been charged.

1. sufficiency of the indictment

"The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). In assessing the sufficiency of an indictment, it is useful to bear in mind the rights that the document serves to protect in our constitutional system. The Fifth Amendment provides for indictment by a grand jury and protects individuals from being twice prosecuted for the same offense, while the

---

[1] Fed. R. Crim. P. 12(b) provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."

[2] Given that the motions to adopt have been granted, the court generally will use "defendants" when referring to the positions taken by either or both of the defendants in their respective motions to dismiss the indictment.

Sixth Amendment guarantees an individual's right to be informed of the charges against him. Because it is a means of safeguarding these constitutional guarantees, an indictment must satisfy three requirements in order to be legally sufficient. *See United States v. Anderson*, 280 F.3d 1121, 1124 (7th Cir. 2002). "First, the indictment must state all of the elements of the crime charged; second, it must adequately apprise the defendant of the nature of the charges so that he may prepare a defense; and third, it must allow the defendant to plead the judgment as a bar to any future prosecutions for the same offense." *United States v. Smith*, 230 F.3d 300, 305 (7th Cir. 2000).

In assessing the sufficiency of an indictment courts are to review the document in its entirety, giving it a practical, rather than hypertechnical, reading. *Id.*

> In setting forth the offense, it is generally acceptable for the indictment to "track" the words of the statute itself, so long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished. *United States v. Hinkle*, 637 F.2d 1154, 1157 (7th Cir.1981). However, an indictment that tracks the statutory language can nonetheless be considered deficient if it does not provide enough factual particulars to "sufficiently apprise the defendant of what he must be prepared to meet." *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). In order for an indictment to satisfy this second hurdle, we require, at a minimum, that it provide some means of pinning down the specific conduct at issue. *United States v. Josten*, 704 F.Supp. 841, 844 (N.D.Ill.1989). Yet in this inquiry, the presence or absence of any particular fact need not be dispositive of the issue.

Id.

Under the first count of the present indictment, the government has charged the defendants with conspiracy to commit mail and wire fraud. Assessing the sufficiency of the indictment requires examining the elements of the underlying substantive offenses as defined in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively.

To convict under the mail or wire fraud statutes, the government must prove: (1) that the defendant participated in a scheme to defraud; (2) that the defendant intended to defraud; and (3) that the defendant used the mail (under 18 U.S.C. § 1341) or wires (under 18 U.S.C. § 1343) in furtherance of the fraudulent scheme.[3] *United States v. Fernandez*, 282 F.3d 500, 506 (7th Cir. 2002) (citing *United States v. Seward*, 272 F.3d 831, 835 (7th Cir. 2001)); *United States v. Davuluri*, 239 F.3d 902 at 906 (7th Cir. 2001). As more fully explained below, the Supreme Court has also held that materiality is an element of mail and wire fraud offenses. The indictment, read in its entirety, must adequately set forth these elements and must adequately apprise the defendant of the nature of the charges and the specific conduct at issue.

---

[3] With the exception of the means (mails or interstate wire communications) by which the underlying scheme to defraud is furthered, the elements of mail and wire are the same. The court will often therefore use "mail fraud" as a convenient shorthand means of referring to both offenses.

a. scheme to defraud

1.) origins and evolution of the concept

While "scheme to defraud" is nowhere defined by statute, the concept has long been the object of judicial construction. The original federal mail fraud statute was enacted in 1872. Act of June 8, 1872, ch. 335 § 301, 17 Stat. 323 (*cited in* Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 Duq. L. Rev. 771, 779 (1980)). The act was passed in response to a perceived need for federal intervention to combat the "growth in large-scale swindles, get-rich-quick schemes, and financial frauds." *Id.* at 780. *See also* Alex Hortis, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U. L. Rev. 1099, 1107. Prosecutions under the early statute were therefore directed at fraudulent schemes that deprived individuals of money or property.

Over time, and after being amended several times, the mail fraud statute came to be applied to protect rights that were less tangible. Eventually, intangible rights prosecutions were incorporated as apart of the larger effort to combat political corruption. Hortis, *supra*, at 1108. A classic example of such a case is *United States v. Mandel*, 591 F.2d 1347, rev'd on rehr'g en banc, 602 F.2d 653 (4th Cir. 1979) (per curiam), in which the governor of Maryland was prosecuted for mail fraud based on, among other things, his accepting bribes in exchange for active support of certain legislation. The court approved of the prosecution of the governor for participating in a scheme to defraud citizens and governmental agencies "of their right to the conscientious, loyal, faithful, disinterested and unbiased services . . . in his official capacities as Governor of the State of Maryland, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official

misconduct and fraud." *Mandel*, 591 F.2d at 1353. The court explained that the public official is a "trustee for the citizens and the state . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty," to the public. *Id.* at 1363; *see also United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974) (upholding the mail fraud conviction of the former governor of Illinois based on evidence "that the State of Illinois and its citizens were deprived of the loyal and honest services of their governor.").

The judge-made right of honest services was not confined to the public sector. An often-cited example of the doctrine's application in the private sector is *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981). The defendant in *Bronston* was a lawyer who wanted to represent Convenience and Safety Corporation ("C&S") in its attempt to obtain a city-funded project. Partners in Bronston's law firm told him in no uncertain terms that, because it was already representing a rival aspirant to the same city contract, the firm and its lawyers were precluded from representing C&S. Despite the clear message from his firm, Bronston continued to perform legal work on behalf of C&S, shielding the activities from both his firm and its clients. The trial court instructed the jury that "a lawyer . . . owes a duty . . . to the clients of his law firm to act with the utmost good faith and loyalty toward the firm's clients and to fully disclose any participation in a conflicting relationship with . . . mutually exclusive business interests of a competitor of the firm's clients which would in any way injure, impair, interfere with or frustrate the business interests of the client in order to promote the mutually exclusive interests of the competitor." John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private*

Distinction, 35 Am. Crim. L. Rev. 427, 433 (1998) (quoting from the trial court's jury instruction) (omission in the original). On appeal, the Second Circuit held that there was sufficient evidence to support Bronston's conviction for mail fraud, explaining in the process that "the concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute." *Bronston*, 658 F.2d at 926.

Courts continued to apply the federal mail and wire fraud statutes to encompass schemes that defrauded individuals or entities of honest services until the Supreme Court explicitly limited the scope of the mail fraud statute in 1987. In *McNally v. United States*, 483 U.S. 350 (1987), the Court held that § 1341 was limited to the protection of property rights. More specifically, the Court held that the umbrella of § 1341 did not reach "schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally*, 483 U.S. at 355.

Concern was immediately expressed over the extent to which *McNally* foreclosed the application of § 1341 to intangible rights. *See, e.g.*, *The Supreme Court, 1986 Term-Leading Cases*, 101 Harv. L. Rev. 329 (1987). The potential impact of *McNally* was muted somewhat the following term, however, when the Court held that the "property" that § 1341 sought to protect included intangible property such as business information. *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

Thus, taken together, the Court's decisions in *McNally* and *Carpenter* drew the line between that which is and that which is not protected under § 1341. The critical

factor in locating that line was not whether a right was tangible or intangible; rather, the critical factor was whether what was at stake was a property right. Just how much of a limitation the *McNally-Carpenter* doctrine imposed on the scope of § 1341 is questionable. Intangible property rights, after all, are not readily susceptible to precise definition; indeed, such rights may seem to some to be precisely the type of "ethereal" rights that the Court purported to place outside the ambit of the statute.[4] Nonetheless, what was clear after the Court's decisions was that § 1341 did not protect the intangible right of honest services, but was limited instead to the protection of property rights. A congressional desire to further extend the reach of the statute would, the Court explained, have to be clearly stated. *McNally*, 483 U.S. at 360.

2.) Section 1346

Wasting little time in accepting the Court's invitation, Congress in 1988 enacted a statute that explicitly defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Section 1346 was intended to overrule *McNally* and "to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire

[4] The relatively abstract nature of things such as business information is perhaps what led one commentator to characterize the Court's decision in *Carpenter* as a "stunning reversal[] of ground" following as it did the *McNally* decision. Charles Fried, *A Tribute to Justice Byron R. White*, 107 Harv. L. Rev. 20, 22 (1993). Of course, the commentator's characterization might also have been influenced by the fact that he happened to be the Solicitor General who was on the losing side of *McNally* and on the winning side of *Carpenter*.

fraud statutes without change." 134 Cong. Rec. S17,360-02 (1988); *see also United States v. Catalfo*, 64 F.3d 1070, 1077 n.5 (7th Cir. 1995); *United States v. Ashman*, 979 F. 2d 469, 477 n.1 (7th Cir. 1992).[5]

Section 1346 has by no means completely allayed the concerns that led the *McNally* Court to place the right to honest services outside the reach of the mail fraud statute. Commentators have variously characterized the statute as standardless, vague, and overly-intrusive. *See, e.g.*, Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 Ariz. L. Rev. 137, 170 (1990); George D. Brown, *Should Federalism Shield Corruption? – Mail Fraud, State Law and Post-Lopez Analysis*, 82 Cornell L. Rev. 225, 229 (1997); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 208-09 (1995).

These types of concerns have informed the courts' efforts to delineate the scope of § 1346, and the circuits have adopted a variety of limiting principles toward that end. Several circuits, for example, interpret § 1346 as prohibiting only those breaches of duty which also violate a state criminal law. *See, e.g., United States v. Panarella*, 277 F.3d 678, 691-93 (3d Cir. 2002); *United States v. Brumley*, 116 F.3d 728, 734-35 (5th Cir. 1997) (en banc). While state criminal law does provide one means of

---

[5] Not all circuits agree with the Seventh Circuit's view that § 1346 was intended to reinstate pre-*McNally* case law. *See, e.g., United States v. Handakas*, No. 00-1751, 2002 WL 449536, at *9 (citing *United States v. Sancho*, 157 F.3d 918, 921 (2d Cir. 1998); *United States v. Brumley*, 116 F.3d 728, 733(5th Cir. 1997).

limiting the reach of § 1346, it happens not to be the means chosen by the Seventh Circuit. Indeed, this circuit has explicitly rejected such a limiting principle. *See United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (rejecting a requirement that a defendant's acts violated both a fiduciary duty and some other rule of law). In the Seventh Circuit, particular emphasis is placed on the office or position of the alleged offender. Thus, a threshold consideration is whether the defendant owes a special duty to the person or entity allegedly being deprived of the right of honest services.

Of course, "[n]ot every breach of every fiduciary duty works a criminal fraud." *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973). Criminalizing every violation of a state-law fiduciary duty would result in the creation of a federal common-law crime, *Bloom*, 149 F.3d at 654, and the prohibition on that species of crime has become so deeply ingrained in our legal culture that it has achieved quasi-constitutional status. *See United States v. Bass*, 404 U.S. 336, 348 (1971); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *Bloom*, 149 F.3d at 656-57. "Misuse of office (more broadly, misuse of position) for private gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime. It is how we can give substance to the statement in *George* that '[n]ot every breach of every fiduciary duty works a criminal fraud.'" *Bloom*, 149 F.3d at 655. Thus, in the Seventh Circuit, a person deprives another of his honest services if he misuses his fiduciary position for personal, gain. *Id.* at 655, 656.

The indictment in the present case alleges that Hausmann referred his clients to Rise in exchange for a kickback in an amount representing twenty percent of the

referred clients' medical bills. The indictment further alleges that Hausmann concealed the kickback arrangement from his clients by directing that the payments be made "to and through" third parties. The defendants agree with the general proposition that there exists a fiduciary relationship between a lawyer and a client. The key point of contention concerns the nature and extent of the lawyer's fiduciary duty, the central question being whether the payment arrangement described above constituted a *misuse* of Hausmann's fiduciary position.[6]

The defendants argue that Hausmann "owe[d] no duty to inform clients about tangential benefits he may receive in connection with his representation. . . . " (Hausmann 14). Using the adjective "tangential" to describe the benefit Hausmann allegedly received mischaracterizes the nature of the kickback. Indeed, it is difficult to imagine a situation in which the nexus between representation and benefit is more direct. The alleged kickback payments were as sure and as calculable as were Hausmann's contingency fees.

Nonetheless, the defendants argue that under the facts set forth in the indictment, "the lawyer does not have a fiduciary duty to the client that is violated by a referral to a qualified professional, regardless of the lawyer's other

[6] The defendants also argue that the indictment fails to adequately allege the personal gain element. But the indictment clearly sets forth actual gain to Hausmann. *See* Indictment at ¶20. Moreover, underlying the indictment read in its entirety is the quite obvious implication that the scheme was one designed for personal gain. Indeed, such is the very nature of "kickback" schemes. Any doubt is alleviated by the explicit connection of the scheme and payments made to Hausmann contained in paragraph 13 of the indictment.

possible motive for referral." (Rise 12). Various codes of professional responsibility say otherwise. Most significantly for purposes of this case, the Rules for Professional Conduct for Attorneys in Wisconsin provide that "[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests. . . . " Wis. SCR 20:1.7(b). Under this rule, "[a] lawyer *may not* allow related business interests to affect representation, for example *by referring clients to an enterprise in which the lawyer has an undisclosed interest*." Wis. SCR 20:1.7 cmt. (1999-2000) (emphasis added).

The defendants argue that the conduct set forth in the indictment does not fall within the scope of Wis. SCR 20:1.7(b) since there is no allegation that nondisclosure adversely affected the representation of clients. (Hausmann Reply at p. 9). There is no authority, however, for requiring such an adverse impact; Rule 20:1.7 contemplates that nondisclosure is itself the harm. Imposing the further requirement that there be an impact on the quality of representation would be akin to requiring actual or contemplated harm to a victim, an element that the Seventh Circuit has held is not required under § 1346. *See Fernandez*, 282 F.3d at 506-07.

b. intent to defraud

The defendants also argue that the indictment should be dismissed for failure to allege that the defendants intended to defraud others. The court notes first that the requisite specific intent is not apparent from the statute itself. *See* Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 St. Thomas L. Rev. 557, 566 (1998). Courts have uniformly held, however, that intent to defraud is a

required element of a § 1346 violation, *See, e.g., Fernandez*, 282 F.3d at 507; *United States v. McGauley*, 279 F.3d 62, 67 (1st Cir. 2002); *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Bearden*, 265 F.3d 732, 736 (8th Cir. 2001). Under certain circumstances in which "the scienter requirement is implied in a statute, the indictment need not allege it; 'it is sufficient that the prosecution prove it and the jury be charged that finding it is essential to conviction.'" *United States v. Metalite Corp.*, No. NA 99-008-CR-B/N, 2000 WL 1234389 (S.D. Ind. July 28, 2000) (citing *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

In any event, the court finds that the indictment does sufficiently allege intent to defraud. It is not necessary, as the defendants contend, for the indictment to allege that the defendants acted with specific intent to harm or injure a particular victim. The defendants cite *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996) and a number of cases from other circuits holding that contemplated harm to a victim is a required element of mail fraud. The Seventh Circuit recently rejected such an argument and made explicit that contemplated harm to a victim is not a required element of mail fraud in this circuit. *See Fernandez*, 282 F.3d at 507 (holding that there was no precedent "to support their position that this Circuit requires the government to prove a contemplated harm to a victim.").

Whatever the law may be elsewhere, "[t]his circuit's cases have defined intent to defraud as 'acting wilfully and with specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another.'" *Davuluri*, 239 F.3d at 906 (quoting *United States v. Moede*, 48 F.3d 238, 241 (7th Cir.

1995)). Thus, deception is the key element of fraudulent intent.[7]

Illustrative of the central role of deception is *United States v. Montani*, 204 F.3d 761 (7th Cir. 2000), a case that involved a defendant who was convicted of defrauding his employer of the benefit of his honest services. In his capacity as a manager for Sears, Montani was responsible for reducing the company's furniture overstock. As part of his duties, he was to obtain the best possible price for damaged and outdated furniture that Sears could not sell at its retail stores. After conducting research into the market for such furniture, Montani reported to his superiors that the surplus could be sold for, at best, between seven and ten percent of the original cost to Sears; Montani was then directed to sell the furniture at the ten-percent level.

Montani eventually entered into an arrangement with Mark Israel, a confederate who had formed a company called D&M Sales. Under the arrangement, Montani sold the damaged or outdated furniture to D&M Sales at the ten percent level. D&M Sales in turn resold the furniture to a company run by Jack Knippel, who paid three times the price paid by D&M Sales. That is, D&M Sales sold the furniture to Knippel at a price equal to thirty percent of the original cost to Sears.[8]

---

[7] Harm to another and personal gain are mere incidents that typically attend the deception and, notably, the court set them forth in the disjunctive. As explained above, the indictment does adequately set forth the personal gain element.

[8] There is some factual dispute in *Montani* as to whether the furniture was resold for thirty or for fifty percent of Sears' original cost. That dispute is of no significance for purposes of the present analysis,

(Continued on following page)

The profit that D&M Sales realized on its sale to Knippel was split between Israel and Montani. Montani's share of the proceeds was deposited into a bank account opened by Montani in the name of Retail Logistics Consulting, for whom Montani was paid a salary as a "consultant."

> This 'salary' was in reality Montani's share of the 20 cent per dollar profit earned on the sale to Knippel. . . . Montani said he did not consider the payment a kickback and insist[ed] it had no effect on his decision to continue selling to D&M.
>
> Instead, he considered it a 'gift' from Israel. Sears never knew that Montani was receiving payments connected to the furniture sales nor that Montani had found, directly or indirectly, a purchaser who would pay [30] cents on the dollar for the merchandise.

Montani, 204 F.3d at 764.

On appeal, Montani argued that there was insufficient evidence to support the jury's guilty verdict. More specifically, the defendant contended that the evidence failed to establish that he had formed the specific intent to defraud Sears. The Seventh Circuit upheld the conviction, holding that the evidence

> clearly established that Montani intended to deprive Sears of the benefit of his honest services, in violation of § 1346. . . . Montani represented to . . . his superior . . . that the best price he could

---

and the court will proceed on the assumption that the thirty percent figure is the correct one.

> get for the furniture under the terms specified by Sears was 10 cents on the dollar. He then arranged with his confederate, Israel, to sell the furniture, on the same terms dictated by Sears, to a buyer who would pay at least three times that amount. To avoid detection, Montani and his confederate constructed a front operation that would provide cover for him to pocket half the extra profits. The transaction was fraudulent in that it deprived Sears of both property – the 20 cents on the dollar it lost – and the honest services of its employee.

Id. at 769.

The deceit and concealment alleged in the present indictment are closely analogous to the type of behavior found to evince a fraudulent intent in *Montani*. The indictment alleges that Hausmann took specific measures "in order to conceal the[ ] kickback payments". Indictment ¶ 21. More specifically, Hausmann is alleged to have "directed that the kickback funds be paid to and through third parties, including:

a. employees and/or agents of Hausmann's corporate entities;

b. a marketing company doing work at Hausmann's direction;

c. charities selected by Hausmann; and

d. entities and individuals performing personal work for Hausmann."

Indictment at ¶ 21. The indictment also alleges that,

> [a]s a further part of the scheme to defraud, Hausmann directed kickback money to Career Youth Development under the further direction

> that the money be used to pay certain bills, including that of a landscaping firm. The bills of the landscaping firm included at least $2,000 in landscaping improvements performed at Hausmann's personal residence.

Indictment at ¶ 22.

Read in its entirety the indictment sufficiently alleges that Hausmann concealed the kickback payments for the purpose of deceiving his clients as to his compensation and his financial interest associated with representing them, and that he did so for personal gain. Of course, it remains to be seen whether the evidence ultimately adduced at trial supports this allegation.

c. materiality

The Supreme Court has made clear that, to form the basis for a mail fraud or wire fraud conviction, the fact that is misrepresented or concealed must be one that is material. *Neder*, 527 U.S. 1, 22, 24 (1999). A misrepresentation or concealment "is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking [sic] body to which it was addressed.'" *Id.* at 16 (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

The indictment in the present case does allege that the "kickback arrangement constituted materially false pretenses, representations and promises toward the clients", Indictment ¶ 16. Thus, at a minimum the indictment sets forth the materiality element. The defendants nonetheless argue that "[t]here is nothing in the facts alleged in the Indictment from which an inference can be drawn that any interested party *would have altered* his/her conduct had the alleged omission not occurred." Hausmann at 20 (emphasis added).

The materiality requirement that the defendants would have this court impose is too stringent. As the Third Circuit explained on remand in *Neder*, "the issue is whether a statement has a tendency to influence or is capable of influencing a decision, and *not whether the statement exerted actual influence*[;] a false statement can be material even if the decision maker did not actually rely on the statement." *United States v. Neder*, 197 F.3d 1122, 1128 (3d Cir. 1999) (emphasis added).

The concealment of the kickback payments as alleged in the indictment is clearly an action that has at least the potential, if not a natural tendency, to influence a client's decision to seek medical treatment from a particular source. Navigating the waters of a lawsuit is a difficult enterprise, and a client relies on his or her attorney for a wide array of advice with respect to the representation. In doing so a client assumes, as he or she ought to be able to, that the advice received is based primarily upon the lawyer's assessment of the client's best interests. The court is convinced that a client, upon becoming aware of his attorney's previously undisclosed financial stake in the client's pursuing a recommended course of action, might potentially be less accepting of the lawyer's advice. The materiality element has therefore been adequately set forth in the indictment.

e. use of the mails or wire: the "in furtherance" requirement

The defendants also contend that the indictment is deficient with respect to the third element of mail or wire fraud. The defendants contend that, while it sets forth the "bare elements of the statute," the indictment nonetheless

fails to set forth a "theory that includes use of the interstate telecommunications system or the mails as part of the execution of a fraudulent scheme." (Hausmann at 23).

The Supreme Court has explained that "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95 (1944). "To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme,' or 'a step in [the] plot.'" *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (citations omitted). Given these standards, it is perhaps not surprising that this element is typically fairly easy to satisfy. *United States v. Hickock*, 77 F.3d 992, 1004 (7th Cir. 1996).

The indictment in the present case clearly alleges that the United States Postal Service, a commercial interstate carrier, and interstate wire communications were used to execute the scheme. *See* Indictment at ¶¶ 23-26. The indictment also identifies the general conduct that is alleged to satisfy this element. *See* Indictment at ¶ 26. The government is not required to *prove* in the indictment that the mailings and wire communications set forth in ¶¶ 23-26 were a part of the execution of the fraudulent scheme. The indictment is facially insufficient only if "there is no conceivable evidence that the government could produce at trial to substantiate its 'in furtherance' allegation." *United States v. Castor*, 558 F.2d 379, 384-85 (7th Cir. 1977). While the court will not speculate unnecessarily as to the precise content of the mailings and wire communications described in ¶ 26, it requires little imagination to conceive

of communications between the parties identified that would properly be determined to be in furtherance of the alleged fraudulent scheme. Accordingly, the court finds that the indictment adequately sets forth the "in furtherance" element.

It is important to bear in mind the nature of the present motion to dismiss the indictment, as well as the appropriate standards for deciding such a motion. As is true with respect to the previous elements, the court is not here deciding that the mailings and wire communications cited in the indictment were in fact in furtherance of a fraudulent scheme. It remains to be seen whether the evidence adduced at trial ultimately supports such a conclusion. That is a question to be resolved by a jury or, if the evidence is such that no reasonable juror could find that the mailings were in furtherance of a fraudulent scheme, via a Rule 29 motion for a judgment of acquittal. It is perhaps instructive in this respect that none of the cases cited by the defendants in support of this portion of their argument involved challenges to the sufficiency of the indictment. Rather, the cases largely involved the sufficiency of the evidence presented at trial and were therefore decided according to standards different from the ones governing the resolution of the present motions. Again, the potential merit of any similar challenge in the present case remains to be seen.

e. the issue of possible surplusage

The defendants argue that the allegations regarding the Milwaukee County Circuit Court and Hausmann's law

partner[9] cannot support a mail or wire fraud charge. In deciding a motion to dismiss an indictment, it is not the court's role to interpret or otherwise delineate the precise contours of the violation at is alleged to have occurred. The court has determined that the indictment sufficiently alleges conspiracy to commit mail and wire fraud. Having done so, it need not address the relevance of the allegations concerning Hausmann's misrepresentations to the Milwaukee County Circuit Court and his concealment of matters from his law partner.

Again, the court is here addressing a motion to dismiss the indictment. The defendants have not moved pursuant to Fed. R. Crim. P. 7(d) to strike any portion of the indictment as surplusage. Rise has, however, requested that the court issue an order dismissing those portions of count one that the court finds relate to invalid theories under the mail and wire fraud statutes. But there are several problems with Rise's request, each more significant than the fact that the proper rule has not been formally invoked. First, as a fundamental matter, the court has not determined (nor will it determine) the

---

[9] The indictment alleges:

17. Also as part as part [sic] of the scheme to defraud, defendant Hausmann caused materially false representations to be made to the Milwaukee County Circuit Court regarding the amount of compensation obtained by the law firm in the settlement of cases involving minors.

18. As a further part of the scheme to defraud, defendant Hausmann concealed from his law partner John McNally that additional compensation had been obtained by Hausmann as part of the insurance settlements. Such conduct constituted materially false pretenses.

validity of any particular theory of prosecution. Second, Rise's request was made for the first time in his reply brief, rather than in a motion and supporting brief filed before the deadline established by the court. As a result, the government has not had an opportunity to respond to the request. Finally, Rise has not presented any arguments concerning the inflammatory or prejudicial effects of any part of the indictment, and it is those effects that the court seeks to eliminate when it exercises its discretion to strike surplusage from an indictment. 1 Charles Alan Wright, Federal Practice and Procedure: Crim. 3d, § 127.

The same considerations apply with respect to the defendants' arguments that the indictment does not allege deprivation of money or tangible property. The indictment sufficiently alleges violations of the mail and wire fraud statutes, and the court will not further construe the document or confine the government to a particular theory of prosecution. Rise asserts that "[f]or the government to pursue these theories at trial amounts to an impermissible constructive amendment of the indictment." Should the government actually pursue those theories at trial, Rise may address his argument to the trial court if he deems it appropriate.

f. summary

"Facial sufficiency is not a high hurdle. Indictments need not exhaustively describe the facts surrounding a crime's commission nor provide lengthy explanations of the elements of the offense." *United States v. Bates*, 96 F.3d 964, 970 (7th Cir. 1996). Because the indictment in this case is "a plain, concise and definite . . . statement of

the essential facts constituting the crime charged," the court recommends that the defendants' motions to dismiss the indictment be denied.

2. vagueness

The defendants also contend that the mail fraud statute is unconstitutionally vague as applied in this case. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

In this connection, the government commendably has brought to this court's attention a recent Second Circuit case that held § 1346 unconstitutionally vague as applied. In *United States v. Handakas*, No. 00-1751, 2002 WL 449536 (2d Cir. March 22, 2002), the defendant was convicted of conspiracy to commit mail fraud by depriving the New York City School Construction Authority of its "intangible right of honest services." *Id.* at *1. The conviction was based on conduct that constituted both a willful breach of contract and a violation of certain duties imposed by state law. The Second Circuit explained that "[f]or the wrongs committed by Handakas, New York law prescribes criminal penalties and may afford contract remedies, but does not afford an action in tort." *Id.* at *12. The court went on to interpret its previous decisions as standing "for the proposition that a scheme to harm another by the breach of a duty enforceable by an action in tort may support a conviction for a scheme to defraud

another of 'honest services.'" *Id.* at *12. However, because the court's previous decisions did not extend the right of honest services to cover purely contractual or state statutory duties, the conduct at issue was not proscribed by § 1346. The problem, in short, was that "[e]ven someone fully familiar with §§ 1341 and 1346, and our cases, would lack any comprehensible notice that federal law has criminalized breaches of contract." *Id.*

The *Handakas* court indicated, however, that a § 1346 charge based on a breach of a fiduciary duty would stand a better chance of surviving a void-as-applied challenge:

> At trial, the government thought it sufficient to argue that Handakas was guilty of conspiracy to commit mail fraud simply by violating his non-fiduciary contractual obligation. . . . The government's improved appellate theory of this prosecution is that the 'honest services' clause may have its limits, but that Handakas's conduct falls within those limits because of a supposed 'agency' relationship between Handakas and the SCA. . . . However, there is no reference to agency (or fiduciary relationships) in the indictment, or in the charge. . . .

Id. at *14.

Unlike the prosecution in *Handakas*, in the present case the government has placed no reliance whatsoever on contractual or state statutory duties. Instead, the government has made it explicit that it is basing the charge on a violation of fiduciary duties. Thus, even under the analysis set forth by the Second Circuit, it does not appear that § 1346 is unconstitutionally vague as applied to the defendants in the instant case.

The concept of an "intangible right of honest services" is not one that, standing alone, is readily amenable to precise definition But "[g]auging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code. Constructions of a statute announced by the Supreme Court or lower courts can give citizens fair warning, even if the cases are not 'fundamentally similar.'" *See United States v. Brumley*, 116 F.3d 728, 732 (5th Cir. 1997) quoting *United States v. Lanier*, 520 U.S. 259, 270 (1997). Again, as explained above, the Seventh Circuit has held that § 1346 extends to fiduciaries who misuse their position for private gain. *Bloom*, 149 F.3d at 655. Indeed, the court emphasized the centrality of fiduciary status as a means of limiting the scope of § 1346's application. *See Id.*

For purposes of vagueness analysis, the significance of Bloom's identification of fiduciary status as a key component of an intangible rights violation is twofold. First, by mooring the concept of the right of honest services to the existence of a fiduciary duty, the court limited the potential reach of § 1346. Second, Bloom eliminates the guesswork as to whether a particular type of conduct is criminally punishable; it cannot be said that someone familiar with §§ 1341 and 1346, and with this circuit's cases applying those statutes, would lack notice that federal criminal law prohibits the misuse of one's fiduciary position for private gain. *Cf. Handakas*, 2002 WL 449536 at *13 ("Even someone fully familiar with §§ 1341 and 1346, and our cases, would lack any comprehensible notice that federal law has criminalized breaches of contract."). The Seventh Circuit had established, well before the scheme set forth in the indictment is alleged to have

begun, that misuse of one's fiduciary position for private gain constitutes fraud under the mail and wire fraud statutes. *Bloom*, 149 F.3d at 655. Further, a reasonable person would have been on notice that a lawyer owed a fiduciary duty to his clients; indeed, the defendants do not dispute the existence of such a general duty. (Hausmann Reply at p. 7) ("The Government says there exists a fiduciary duty between a lawyer and a client. . . . Hausmann, of course, agrees with that general concept.) Finally, the existence of SCR 20:1.7 was available as advice to the reasonably well-informed that the type of arrangement alleged in the indictment could at least potentially constitute a misuse of the fiduciary relationship between a lawyer and his clients. Accordingly, the court finds that § 1346, as applied to the defendants in the present case, is not unconstitutionally vague.

3. federalism

Finally, the defendants argue that the present prosecution is contrary to principles of federalism. The gist of the defendants' argument is that the prosecution of these defendants is an example of the type of federal "overreaching" in the criminal law of which the Supreme Court disapproved in *United States v. Lopez*, 514 U.S. 549 (1995).

The defendants do not contend that Congress exceeded its constitutional authority in enacting the mail or wire fraud statutes or § 1346. Indeed, in support of their federalism argument, they point to no specific constitutional provision that is contravened either by Congress in enacting the legislation or by the executive branch in pursuing the course it has chosen. *Cf.*, *e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free

School Zones Act was unconstitutional on the grounds that it was beyond Congress' Article I power to regulate interstate commerce); *New York v. United States*, 505 U.S. 144 (1992) (holding that an act of Congress that compelled a state to enact or enforce a particular type of law was an unconstitutional "commandeering" of the state legislative process in violation of the Tenth Amendment). To the extent that the defendants ask the court to dismiss this indictment because it is inconsistent with the general political theory that seems to be animating the current Supreme Court, the court declines the invitation.

Before leaving this issue, the court pauses to address one other aspect of the defendants' argument. As the defendants rightly point out, breaches of ethical duties are typically matters left to state law, and this is a factor that generally weighs against criminalizing particular conduct federally. *See Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977). But it is only one factor, and it is by no means dispositive. The federal criminal code is of course rife with statutes that proscribe behavior traditionally punishable under state law. What is required in order to render the conduct punishable as a federal crime is some type of jurisdictional nexus linking the prohibited conduct with, for example, one of the congressional powers enumerated in Article I of the Constitution. The defendants have not here argued that the relevant statutes are beyond the postal or commerce powers granted to Congress in Article I. *See* U.S. Const. art. I sec. 8 cl. 3, 7. Without some showing that either the statutes in question or the prosecution of this particular case contravene some specific rule of constitutional or statutory law, the mere fact that the conduct in question is of a sort traditionally dealt with

through state law cannot serve as a basis for dismissing this indictment.

4. count two: interstate transportation

Hausmann argues that the second count of the indictment, alleging interstate transportation of stolen securities, also fails. According to Hausmann, "because the securities at issue here were not converted or taken by fraud, there can be no illegal transport." (Hausmann Brief at p. 29.) Because the premise upon which this argument rests has been rejected, the court also recommends that Hausmann's motion be denied to the extent that it seeks dismissal of count two.

5. sufficiency of the allegations regarding Rise's acts and mental state

Rise contends that "[t]he allegations, if proven, do not establish that Dr. Rise joined the alleged scheme, knew of its fraudulent nature, or intended to achieve its illicit objectives." An indictment need not "establish" any particular fact; it need only make allegations. The allegations required for a conspiracy charge may be discerned by reference to the conspiracy statute. Section 371, the conspiracy section under which Hausmann and Rise were charged, makes it a crime for "two or more persons [to] conspire . . . to commit any offense against the United States [if] one or more of such persons do any act to effect the object of the conspiracy." 18 U.S.C. § 371. The language of the statute indicates that it is not necessary for

each coconspirator to perform every act that is alleged in the conspiracy count.[10] What must, however, be alleged is that each coconspirator joined the conspiracy.

As the government points out, the indictment in this case alleges that Rise "knowingly devise[ ] and participate [ ]. in a scheme to defraud others during the handling of personal injury cases." Indictment at ¶ 1. The indictment further alleges that Rise "engaged in a kickback scheme, whereby Rise, on behalf of MSIC, paid Hausmann for the referral of clients to MSIC." Indictment at ¶ 13. The indictment also identifies a series of specific acts that Rise is alleged to have done in furtherance of the conspiracy. More specifically, the indictment cites nine occasions on which Risse [sic] is alleged to have signed an MSIC check as a kickback payment. The court is satisfied that the foregoing sufficiently alleges Rise's knowing participation in the fraudulent scheme set forth in the indictment and alerts Rise to the conduct at issue.

C. Motions for Pretrial Disclosure of Fed. R. Crim P. 16(a) Information and Fed. R. Evid. 404(b) and 807 Evidence

The defendants have each filed a separate motion seeking disclosure not less than thirty days before trial of evidence the government intends to introduce at trial under Fed. R. Evid. 404(b) and 807. The motions also seek

---

[10] Thus has derived the rule that a coconspirator may be found guilty of a substantive offense that any of his coconspirators committed in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946).

disclosure of all information and documents falling under Fed. R. Crim. P. 16(a). The government indicates in its response that it is following its open-file policy and that it "has already given the defendants the type of written notices that they seek." Rise has indicated that he is satisfied with the government's response and Hausmann has declined to reply, opting to rely on his initial motion. Given the representations made by the government in its response, the court will deny the defendants' motions as moot.

D. Motion to Preserve Agents Notes

The defendants have also filed a motion asking the court to order the government to preserve and disclose agents' notes. Again, the government indicates in its response that it is following its open-file policy and that it "has already given the defendants the type of written notices that they seek." Given these representations, the court will deny the defendants' motions as moot.

E. Rise's Motion for a Bill of Particulars

Finally, defendant Rise has filed a motion asking the court to order the government to file a bill of particulars. Through this motion Rise seeks the following:

1. Identities of all persons who are alleged by the government to be the intended victims of the alleged conspiracy/scheme to defraud.

2. Objects of the charged conspiracy/ scheme to defraud.

3. Identities of other persons claimed by the government to be members of the alleged

conspiracy (Rise expects this particular to be "none," but seeks confirmation).

4. Description and source of any fiduciary duty the government ascribes to Dr. Rise.

5. Identification of any materially false pretenses, representations and promises alleged to have been made by Dr. Rise.

6. Source of any obligation on the part of Dr. Rise to inform anyone of the "kickback arrangement."

7. Whether the government claims that Dr. Rise was involved in the claimed false representations by Hausmann to the Milwaukee County Circuit Court, the claimed concealment by Hausmann from McNally of additional compensation, or the claimed concealment by Hausmann of "kickback payments."

Governed by Fed. R. Crim. P. 7(f), a bill of particulars is a defendant's means of securing additional information regarding the charges against him. A bill of particulars is not, however, properly employed as a means of forcing the government to reveal the evidentiary details concerning how it plans to prove its case. *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991). Deciding whether a bill of particulars is necessary requires the court to determine "whether the government's indictment sufficiently apprises the defendant of the charges to enable him to prepare for trial." *United States v. Canino*, 949 F.2d 928, 949 (7th Cir. 1991). The court is also to consider whether the information necessary to prepare an adequate defense is available through "some other satisfactory form." *Id.* (quoting 1 Charles Alan Wright, Federal Practice and Procedure: Crim.2d, § 129 (1982)). For example, "the

'open-file' policy is an adequate 'satisfactory form' of information retrieval, making the bill of particulars unnecessary." *Id.*

The bill of particulars requested here is similar to that requested, and rejected, in *United States v. Brock*, 863 F.Supp. 851 (E.D. Wis. 1994). The defendants in that case were charged with violating the Freedom of Access to Clinic Entrances Act (FACE). The court ruled that the defendants were not entitled to a bill of particulars disclosing the evidence the government intended to use to prove that particular actions constituted "intimidation" or "obstruction" under FACE. The court also characterized as evidence falling outside the scope of a bill of particulars a list of targets of the defendants' alleged intimidation and interference. Similarly, Rise's requests largely seek evidence relating to (1) the particular actions that the government contends will satisfy legal concepts, (2) targets of the alleged illegal acts, and (3) more precise interpretations regarding legal definitions. The defendant is not entitled to a bill of particulars addressed to such requests.

In any event, the government contends that much of what Rise seeks is contained in the discovery that has been provided, "including the list of Hausmann clients upon which the kickbacks were based, descriptions of the conduct of Rise in the kickbacks, and the representations that Hausmann's firm made in Milwaukee County Circuit Court." (Government's Brief at p. 31.) The government has also represented, as Rise expected, that there were no other members of the alleged conspiracy. In short, the court is not persuaded that the information provided in the indictment and through the government's open file policy is insufficient to allow the defendant to prepare an

adequate defense. Rise's motion for a bill of particulars will therefore be denied.

III. CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that the defendants' motions to adopt be and hereby are **GRANTED**;

IT IS HEREBY RECOMMENDED that the defendants' motions to dismiss be **DENIED**;

IT IS FURTHER ORDERED that the defendants' motions for pretrial disclosure of Fed. R. Crim P. 16(a) information and Fed. R. Evid. 404(b) and 807 evidence be and hereby is **DENIED** as moot;

IT IS FURTHER ORDERED that defendant Rise's motion for a bill of particulars be and hereby is **DENIED**.

Any objection to this recommendation and these orders must be filed with the Clerk of Court, in duplicate, within ten days of service of the same. *See* 28 U.S.C. § 636(b)(1)(A), (B) and (C) and General L.R. 72.3 (E.D. Wis.). Failure to file a timely objection with the district court shall result in a waiver of your right to appeal.

SO ORDERED this 17th day of April, 2002, at Milwaukee, Wisconsin.

/s/ William E. Callahan, Jr.
WILLIAM E. CALLAHAN, JR.
United States Magistrate Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 28, 2003

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

Nos. 02-3945, 02-3946	Appeal from the United States District Court for the Eastern District of Wisconsin.
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	
v.	No. 02 CR 10
CHARLES J. HAUSMANN and SCOTT P. RISE, *Defendants-Appellants.*	Charles N. Clevert, Jr. *Judge.*

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above captioned cases by defendants-appellants, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny*. Therefore, the petitions for rehearing and suggestions for rehearing en banc are hereby DENIED.

---

* The Honorable John L. Coffey and The Honorable Terence T. Evans, took no part in the consideration of these petitions.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. 02-CR010

CHARLES J. HAUSMANN and SCOTT P. RISE, Case No. 02-CR-

Defendants.

INDICTMENT

(Filed Jan. 8, 2002)

The Grand Jury Charges:

The Scheme to Defraud

1. Between on or about October 13, 1999, and on or about June 21, 2001, in the State and Eastern District of Wisconsin, and elsewhere,

Charles J. Hausmann and Scott P. Rise

did knowingly devise and participate in a scheme to defraud others during the handling of personal injury cases.

Background Allegations

2. During the time period of the scheme, Charles Hausmann was an attorney at the law firm of Hausmann-McNally, S.C., 633 West Wisconsin Avenue, Milwaukee, Wisconsin.

3. Hausmann-McNally. S.C. specialized in handling personal injury cases, the majority of which were the result of automobile accidents.

4. The personal injury cases often resulted in insurance companies paying sums of money through the attorneys to the clients. Deducted from the sums would be legal fees, medical bills and other expenses.

5. The legal fees usually were one-third of the settlement amount. The medical bills often were a negotiated amount of the total outstanding bills. If the client was a minor, the legal fees usually required court approval and were reduced to one-fourth of the settlement amount.

6. Defendant Hausmann also directed other business activities, including those under the names Juniper Enterprises and Andrew-Hausmann, LLC.

7. Also during the time period of the scheme, defendant Rise was an owner and operator of the Milwaukee Spinal Injury Center, 7101 W. Capital Drive in Milwaukee.

8. The Milwaukee Spinal Injury Center (hereafter "MSIC") treated individuals through chiropractic services.

Fiduciary Relationship

9. During the time period of the scheme, Hausmann-McNally, S.C., including defendant Hausmann and other agents and employees under his direction, owed a fiduciary duty to the clients of the law firm.

10. The fiduciary relationship included the obligation of Hausmann-McNally to disclose to the client any financial interest that the law firm may have involving the

representation; to advise the client in a conflict-free manner; and to negotiate in the best interest of the client.

11. Hausmann-McNally also was obligated to provide accurate and complete information to the clients regarding the financial terms of personal injury case settlements, as well as the amount of compensation taken by the lawyers involved in the case.

12. The law firm owed the clients the intangible right of honest services, as that term is used in Title 18, United States Code, section 1346.

Kickback Scheme

13. During the time period of the scheme to defraud, defendant Hausmann and defendant Rise engaged in a kickback scheme, whereby Rise, on behalf of MSIC, paid Hausmann for the referral of clients to MSIC.

14. The amount of the payments approximated 20 percent of the settlement on the medical bills of MSIC associated with the Hausmann-McNally referrals.

15. The kickback arrangement was concealed from the clients of Hausmann-McNally in violation of the fiduciary duty described above.

16. The kickback arrangement constituted materially false pretenses, representations and promises toward the clients with respect to:

a. the relationship between Hausmann-McNally, S.C. and MSIC;

b. the compensation obtained by the law firm and lawyers as a result of the case;

c. the amount of medical payments actually kept by MSIC.

Other Fraudulent Acts

17. Also as part of the scheme to defraud, defendant Hausmann caused materially false representations to be made to the Milwaukee County Circuit Court regarding the amount of compensation obtained by the law firm in the settlement of cases involving minors.

18. As a further part of the scheme to defraud, defendant Hausmann concealed from his law partner John McNally that additional compensation had been obtained by Hausmann as part of the insurance settlements. Such conduct constituted materially false pretenses.

Concealment of Kickback Payments

19. During the time period of the scheme to defraud, Hausmann-McNally referred approximately 200 clients to MSIC. The subsequent insurance settlements resulted in more than $350,000 being paid to MSIC.

20. The amount of kickbacks exceeded $70,000.

21. In order to conceal these kickback payments, defendant Hausmann directed that the kickback funds be paid to and through third parties, including:

a. employees and/or agents of Hausmann's corporate entities;

b. a marketing company doing work at Hausmann's direction;

c. charities selected by Hausmann; and

d. entities and individuals performing personal work for Hausmann.

22. As a further part of the scheme to defraud, Hausmann directed kickback money to Career Youth Development under the further direction that the money be used to pay certain bills, including that of a landscaping firm. The bills of the landscaping firm included at least $2,000 in landscaping improvements performed at Hausmann's personal residence.

The Grand Jury Further Charges:

COUNT ONE: Conspiracy

23. Between on or about October 13, 1999, and on or about June 21, 2001, in the State and Eastern District of Wisconsin, and elsewhere,

Charles J. Hausmann and
Scott P. Rise

did knowingly conspire between themselves to commit mail and wire fraud offenses.

Mail and Wire Fraud

24. The mail and wire fraud offenses included conduct whereby defendants Hausmann and Rise, and others acting on their behalf, for the purpose of executing and attempting to execute a scheme to defraud: (a) did cause and intend to cause matter to be delivered by the United States Postal Service and commercial interstate carrier according to the directions thereon, in violation of Title 18, United States Code, sections 1341 and 2; and (b) did cause and intend to cause sounds to be transmitted in interstate commerce by means of wire communications, in

violation of Title 18, United States Code, sections 1343 and 2.

25. The details of the scheme to defraud are set forth above and incorporated herein.

26. The matter included: (a) solicitations and communications from Hausmann-McNally to clients; (b) communications between the Hausmann-McNally lawyers and MSIC regarding billings; and (c) communications between Hausmann and certain recipients of the kickback checks. The interstate wire communications included telephone calls, facsimiles and emails between Hausmann and certain recipients of the kickback checks; and telephone calls from Hausmann to others regarding the flow of kickback payments.

Acts in Furtherance of the Conspiracy

27. On or about December 2, 1999, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

28. On or about March 9, 2000, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

29. On or about March 31, 2000, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

30. On or about April 28, 2000, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

31. On or about June 1, 2000, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

32. On or about June 30, 2000, in the State and Eastern District of Wisconsin, Scott r-Rise did sign MSIC checks as kickback payments.

33. On or about August 1, 2000, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

34. On or about September 15, 2000, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as a kickback payment.

35. On or about April 30, 2001, in the State and Eastern District of Wisconsin, Scott P. Rise did sign MSIC checks as kickback payments.

All in violation of Title 18, United States Code, section 371.

The Grand Jury Further Charges:

COUNT TWO: Interstate Transportation

36. The factual allegations of paragraphs numbered one through twenty-two above are incorporated herein.

37. On or about November 10, 2000, in the State and Eastern District of Wisconsin, and elsewhere,

Charles J. Hausmann

did knowingly cause in excess of $5,000 in securities to be transferred in interstate commerce knowing the securities to have been converted and taken by the above described

fraud. The securities were checks from Milwaukee Spinal Injury Center and were sent from Wisconsin to Oregon.

All in violation of Title 18, United States Code, sections 2314 and 2.

A TRUE BILL:

/s/ [Illegible]
FOREPERSON

Dated: 1-8-2002

/s/ James L. Santelle
JAMES L. SANTELLE
United States Attorney

Supreme Court, U.S.
FILED
APR 30 2004
OFFICE OF THE CLERK

(2)

No. 03-1088

In the Supreme Court of the United States

SCOTT RISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner was validly convicted of conspiracy to commit mail and wire fraud based on his participation in a kickback scheme.

2. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services," is unconstitutionally vague.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 (1976)	19
Carpenter v. *United States*, 484 U.S. 19 (1987)	9
Chapman v. *United States*, 500 U.S. 453 (1991)	17
City of Chicago v. *Morales*, 527 U.S. 41 (1999)	17
Cleveland v. *United States*, 531 U.S. 12 (2000)	10
Kolender v. *Lawson*, 461 U.S. 352 (1983)	17
McNally v. *United States*, 483 U.S. 350 (1987)	9, 10, 15, 19
Parker v. *Levy*, 417 U.S. 733 (1974)	18
United States v. *Bloom*, 149 F.3d 649 (7th Cir. 1998)	13
United States v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 522 U.S. 1028 (1997)	13
United States v. *Castro*, 89 F.3d 1443 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997)	19
United States v. *Cochran*, 109 F.3d 660 (10th Cir. 1997)	11
United States v. *deVegter*, 198 F.3d 1324 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000)	10, 11
United States v. *Dial*, 757 F.2d 163 (7th Cir.), cert. denied, 474 U.S. 838 (1983)	14
United States v. *Feldman*, 711 F.2d 758 (7th Cir.), cert. denied, 464 U.S. 939 (1983)	16, 17, 18-19
United States v. *Frega*, 179 F.3d 793 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000)	19

Cases—Continued: Page

United States v. *Frost*, 125 F.3d 346 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998) 10, 11, 12
United States v. *Gray*, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997) 11, 19
United States v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002) 20
United States v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997) 11, 16
United States v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984) 9, 10, 13, 17
United States v. *Martin*, 195 F.3d 961 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000) 13
United States v. *Martin*, 228 F.3d 1 (1st Cir. 2000) 10
United States v. *Mazurie*, 419 U.S. 544 (1975) 17
United States v. *O'Hagan*, 521 U.S. 642 (1997) 18
United States v. *Panarella*, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002) 14
United States v. *Paradies*, 98 F.3d 1266 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997) 19
United States v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003), petition for cert. pending, No. 03-1375 (filed Mar. 29, 2004) 11, 19, 20
United States v. *Sun-Diamond Growers*, 138 F.3d 961 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999) 10, 11
United States v. *Szur*, 289 F.3d 200 (2d Cir. 2002) 19
United States v. *Vinyard*, 266 F.3d 320 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002) 10, 11, 12
United States v. *Waymer*, 55 F.3d 564 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996) 19
United States v. *Welch*, 327 F.3d 1081 (10th Cir. 2003) 13, 19
Wisniewski v. *United States*, 353 U.S. 901 (1957) 17

Constitution, statutes and rule:	Page
U.S. Const. Amend. V (Due Process Clause)	17, 19
18 U.S.C. 371	1
18 U.S.C. 1341	3, 9
18 U.S.C. 1343	3, 9
18 U.S.C. 1346	3, 9, 10, 13, 17, 18, 19, 20
Fed. R. Crim. P. 11(a)(2)	4

In the Supreme Court of the United States

No. 03-1088

SCOTT RISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 345 F.3d 952.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2003. A petition for rehearing was denied on October 28, 2003 (Pet. App. 68). The petition for a writ of certiorari was filed on January 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. 371. He was

sentenced to two months of imprisonment, to be followed by 12 months of supervised release, and was fined $10,000. Petitioner and his co-defendant were also found jointly and severally liable for $77,062.87 in restitution. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner is a chiropractor who owned Milwaukee Spinal Injury Center (MSIC), a chiropractic clinic in Milwaukee, Wisconsin. His co-defendant Charles Hausmann is a personal injury lawyer who often negotiated settlements with insurance companies for clients of his law firm, Hausmann-McNally, S.C. Under Hausmann-McNally's standard retainer agreement, the client agreed to pay the law firm one-third of whatever total sum was collected. The agreement also authorized the law firm to pay medical and other bills incurred as a result of an accident. The funds used to pay those bills would be sent directly to the doctors and hospitals who had performed the relevant medical services and would be deducted from the client's portion of the recovery. Hausmann-McNally often referred clients to health care providers for treatment of their injuries. When necessary to achieve a fair settlement for the client, the law firm would negotiate a reduction in a medical bill with the health care provider. Pet. App. 2-3; Gov't C.A. Br. 9-10.

The instant prosecution was based on a referral arrangement under which Hausmann directed clients to petitioner's clinic. After Hausmann-McNally had paid the clients' medical bills out of the settlement proceeds, petitioner made payments equal to 20% of the bills to various third parties at Hausmann's direction. Such payments were made by MSIC to individuals who had provided personal services to Hausmann or his relatives, a marketing firm hired by Hausmann, business

entities in which Hausmann held an interest, and charities that Hausmann supported. Between October 1999 and June 2001, MSIC was paid $371,862.39 for medical bills for Hausmann's clients, and MSIC paid $77,062.87 to third parties at Hausmann's direction. The referral arrangement was not disclosed to Hausmann's clients or to his law partners. Pet. App. 2-3; Gov't C.A. Br. 7-8, 11-17.

The settlement payments for MSIC's medical bills were handled differently from payments to other medical providers, who were typically issued checks after the settlement proceeds were received. Hausmann directed that the checks to MSIC be segregated, and he met with petitioner each month to deliver the checks. At those meetings, petitioner would then write checks, on MSIC's behalf, payable to third parties that Hausmann named. Petitioner admitted to one of his employees that he paid Hausmann 20% kickbacks on the medical bills by writing checks to third parties at Hausmann's direction. When he was subsequently confronted by federal agents, petitioner denied paying kickbacks to Hausmann. Gov't C.A. Br. 12-13, 18-19.

2. Count One of the indictment (Pet. App. 69-75) charged that petitioner and Hausmann had conspired to commit mail and wire fraud offenses. The federal mail and wire fraud statutes prohibit the use of mail or wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. The term "scheme or artifice to defraud" is defined to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Before trial, petitioner and Hausmann moved to dismiss the indictment on the grounds that it failed to

charge an offense and that the mail and wire fraud statutes were unconstitutionally vague as applied in this case. Agreeing with the magistrate judge's recommendation, see Pet. App. 33-67, the district court denied the motion. *Id.* at 16-18. Shortly thereafter, Hausmann entered a conditional guilty plea to Count One of the indictment pursuant to Federal Rule of Criminal Procedure 11(a)(2), reserving his right to appeal the denial of the motion. Pet. App. 3 & n.2.

3. In its jury instructions at petitioner's trial, the district court defined the term "scheme to defraud" as follows:

> A scheme to defraud is a plan or course of action formed with an intent to accomplish some purpose. A scheme to defraud is a scheme that is intended to deceive or cheat another and to obtain money or property or to cause the loss of money or property of another or to deprive a client of his or her right to the honest services of his or her attorney by means of materially false and fraudulent pretenses, representation[s] or promises.

06/07/02 Tr. 569. The court emphasized that it was "essential that one or more of the false pretenses, representations, promises and acts charged in the portion of the indictment describing the scheme be proven beyond a reasonable doubt."[1] *Id.* at 570. The court further explained (*ibid.*):

---

[1] The indictment alleged that the kickback arrangement constituted materially false pretenses, representations, and promises towards Hausmann's clients with respect to: (a) "the relationship between Hausmann-McNally, S.C. and MSIC"; (b) "the compensation obtained by the law firm and lawyers as a result of the case"; and (c) "the amount of medical payments actually kept by MSIC." Pet. App. 71-72.

> A pretense, representation, promise or act is material if it has a natural tendency to influence or is capable of influencing the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction [on] particular terms. However, it is not necessary that the person was actually influenced by the pretenses, representation, promise or act.

With respect to the existence of a scheme to deprive Hausmann's clients of their right to the law firm's honest services, the district court instructed the jury:

> To find that there existed a scheme to deprive one or more clients of the Hausmann McNally law firm of his or her right to the honest services of that firm you must find beyond a reasonable doubt, first, that a fiduciary relationship existed between one or more of the clients of the Hausmann McNally law firm. Second, that [petitioner] and Charles Hausmann knowingly engaged in a scheme to deprive one or more clients of the Hausmann McNally law firm of the right to honest services of the Hausmann McNally law firm as charged in Count 1. And, third, that through such scheme Charles Hausmann misused his fiduciary relationship with one or more clients of the Hausmann McNally law firm for personal gain.

06/07/02 Tr. 570-571. The district court also instructed the jury that it was required to find that petitioner "became a member of the conspiracy with an intention to further the conspiracy and in doing so acted with intent to defraud." *Id.* at 571. The court further explained (*id.* at 573):

> To act with intent to defraud means that the acts charged were done knowingly with the intent to deceive or cheat the clients of the Hausmann McNally law firm to cause a gain of money by [petitioner] or Charles Hausmann, the loss of money by one or more clients of the Hausmann McNally law firm or to deprive one or more clients of the Hausmann McNally law firm of the right to the honest services of Charles Hausmann or the Hausmann McNally law firm by means of materially false and fraudulent pretenses, representations, or promises.

The district court declined to instruct the jury that, in order to find petitioner guilty, it was also required to find that petitioner reasonably contemplated harm to Hausmann's clients and that the scheme was intended to cause a loss to Hausmann's clients as well as a gain to Hausmann. Pet. App. 12-13; Gov't C.A. Br. 47. The jury found petitioner guilty.

4. The court of appeals affirmed the convictions of petitioner and Hausmann. Pet. App. 1-15. The court expressed doubt that the "'intangible-rights theory' provisions of the mail and wire fraud statutes" could validly be applied to cases involving "breach of fiduciary duty with nothing more." *Id.* at 5-6. The court nevertheless rejected petitioner's challenges to the sufficiency of the indictment and the sufficiency of the evidence. *Id.* at 4-10. Relying on prior Seventh Circuit precedents, the court explained that, "under the intangible-rights theory * * *, a valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his

fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed." *Id.* at 6.

The court of appeals held that the indictment adequately alleged, and the evidence at trial was sufficient to show, that Hausmann had breached a fiduciary duty to his clients. Pet. App. 6-7. The court also concluded that the government had alleged and proved that "Hausmann gained over $70,000 in kickback payments made to third parties for his personal benefit or entities in which he had some interest * * * and that such concealed payments deprived clients of the intangible right of honest services." *Id.* at 7. The court rejected petitioner's argument that the referral arrangement did not harm Hausmann's clients. *Id.* at 8. The court explained that "Hausmann deprived his clients of their right to know the truth about his compensation," and that "every dollar of [petitioner's] effective twenty percent fee discount went to Hausmann's benefit" when "that discount should have inured to the benefit of his clients." *Ibid.* The court concluded that "Hausmann illegally profited at the expense of his clients, who were entitled to his honest services as well as their contractually bargained-for portion of [petitioner's] discount." *Ibid.* In addition, the court held that petitioner, as "the knowing payer of an illegal kickback," had "acted in furtherance of the conspiracy to defraud the clients" and was therefore criminally liable to the same extent as Hausmann. *Id.* at 9.

The court of appeals rejected petitioner's claim that the mail and wire fraud statutes were unconstitutionally vague as applied in this case. Pet. App. 10-11. The court explained that prior Seventh Circuit decisions had "placed [petitioner and Hausmann] on notice that criminal liability under the mail and wire fraud statutes—particularly under an intangible-rights

theory—attaches to the misuse of one's fiduciary position for personal gain." *Id.* at 11. The court also observed that "the existence of Hausmann's fiduciary duty owed to his clients distinguishes this case from one where the government arbitrarily and impermissibly relies upon the mail and wire fraud statutes to enforce merely the terms of a private contract." *Ibid.*

Finally, the court of appeals held that the district court had correctly declined to instruct the jury that it was required to find that petitioner reasonably contemplated harm to Hausmann's clients or that the scheme was intended as a loss to Hausmann's clients as well as a gain to Hausmann. Pet. App. 12-14. The court found "no requirement under the law * * * that a co-conspirator to a wire and mail fraud scheme contemplate actual or foreseeable harm to the victim." *Id.* at 13. The court also found that, "though the law does not require the court to instruct a jury that the scheme is intended to cause a loss to the victims *as well as* a gain to the offender, the loss element [was] implicit in the district court's references both to a deprivation of one or more clients' right to honest services—a type of loss in and of itself—and to Hausmann's gain." *Ibid.* "[O]nce [petitioner] opted to discount his fees for chiropractic services," the court explained, "Hausmann's clients shared [petitioner's] economic loss—a corollary to their entitlement to a portion of Hausmann's gain." *Id.* at 13-14.

ARGUMENT

1. Petitioner contends (Pet. 6-18) that his conviction for conspiracy to commit mail fraud and wire fraud is invalid because the government did not prove reasonably foreseeable or contemplated harm to the victims of the scheme to defraud. He asserts that this Court's

review is warranted to resolve a conflict among the courts of appeals over the scope of honest services fraud under 18 U.S.C. 1346. Petitioner overstates the significance of the differences among the courts of appeals on the scope of Section 1346, however, and he fails to identify any decision of another court of appeals that has reached a conflicting result on comparable facts. This Court's review is therefore not warranted.

a. The mail fraud statute, 18 U.S.C. 1341, and the wire fraud statute, 18 U.S.C. 1343, make it unlawful to use mail and wire communications to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[2] Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the intangible rights covered by the statute included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In *McNally*, this Court rejected the "intangible rights" theory of mail fraud prosecution, holding that the mail fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in

---

[2] Because the mail and wire fraud statutes share the same operative language, the same analysis applies to both sets of offenses. See *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

McNally that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360. Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

b. Both before and after *McNally*, courts of appeals have expressed concern that honest services fraud in the private sector could encompass mere breaches of loyalty or fiduciary duty. See, *e.g.*, *United States* v. *Vinyard*, 266 F.3d 320, 326-327 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *United States* v. *deVegter*, 198 F.3d 1324, 1328-1329 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000); *United States* v. *Frost*, 125 F.3d 346, 368 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); *Lemire*, 720 F.2d at 1336-1337. Seeking to avoid a perceived potentially overbroad construction of Section 1346, the First, Fourth, Sixth, Eleventh, and District of Columbia Circuits have concluded that, when honest services mail fraud is charged in the context of private corruption, the government must show, *inter alia*, that the deception exposed the victim to reasonably foreseeable potential economic harm. See *United States* v. *Martin*, 228 F.3d 1, 17-18 (1st Cir. 2000); *Vinyard*, 266 F.3d at 327-329; *Frost*, 125 F.3d at 368-369; *deVegter*, 198 F.3d at 1329-1330; *United States* v. *Sun-Diamond Growers*, 138 F.3d 961, 973-974 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999). The "reasonably foreseeable harm" test adopted by those circuits does not require proof of an actual economic loss or an intent to cause economic harm to the victim.

See *Vinyard*, 266 F.3d at 329; *Sun-Diamond Growers*, 138 F.3d at 974; *Frost*, 125 F.3d at 369. Rather, "the prosecution must prove only that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk." *Frost*, 125 F.3d at 369; see also *Vinyard*, 266 F.3d at 329; *deVegter*, 198 F.3d at 1330.

As petitioner recognizes (Pet. 9-10, 13-14), other courts of appeals have used a different formulation to limit the scope of private sector honest services fraud. Instead of requiring proof that a defendant reasonably should have foreseen that his deception would create an identifiable risk of harm to the victim, the Second, Fifth, Eighth, and Tenth Circuits require proof that the defendant possessed fraudulent intent and made a material misrepresentation. See *United States* v. *Rybicki*, 354 F.3d 124, 145-146 (2d Cir. 2003) (in banc), petition for cert. pending, No. 03-1375 (filed Mar. 29, 2004); *United States* v. *Gray*, 96 F.3d 769, 774-775 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Jain*, 93 F.3d 436, 441 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997); *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). Under the "materiality" test, "the misrepresentation or omission at issue for an 'honest services' fraud conviction must be 'material,' such that the misinformation or omission would naturally tend to lead or is capable of leading a reasonable [victim] to change its conduct." *Rybicki*, 354 F.3d at 145; see *Cochran*, 109 F.3d at 667-668 n.3; *Gray*, 96 F.3d at 775.

The jury instructions given by the district court in this case are consistent with prior decisions that apply the "materiality" test. The court defined the term "scheme to defraud" to require deception "by means of

materially false and fraudulent pretenses, representation[s] or promises." 06/07/02 Tr. 569. The district court also instructed the jury that it was required to find that petitioner "acted with intent to defraud." *Id.* at 571. Thus, although the jury was not explicitly required to find that the defendants' conduct created a reasonably foreseeable risk of harm to the clients referred by Hausmann to petitioner, the instructions did require the jury to find both that (i) the conspirators' concealment of the kickback scheme was material to the clients' decisions to retain Hausmann as their attorney and to obtain medical services from petitioner, and (ii) petitioner acted with fraudulent intent.

c. No meaningful substantive difference exists between the "materiality" test reflected in the district court's jury instructions and the "reasonably foreseeable harm" test utilized by some courts of appeals. A representation "is material if it has a natural tendency to influence or is capable of influencing the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction [on] particular terms." 06/07/02 Tr. 570. If a particular misrepresentation would have a "natural tendency to influence" a reasonable person's decision, then it is, *ipso facto*, "reasonably foreseeable" that the misrepresentation will "harm" that person by causing him to engage in conduct in which he would not engage if he were aware of the relevant facts. See, *e.g.*, *Vinyard*, 266 F.3d at 328 n.7 ("For the most part, application of the materiality approach will be identical to the reasonably foreseeable harm test, because an employer would almost certainly alter his business practices if disclosure of a fraud scheme revealed either foregone business opportunities or an economic threat."); *Frost*, 125 F.3d at 368 (observing that "the difference between the two standards

may be slight"); *Lemire*, 720 F.2d at 1337 ("Although [the reasonably foreseeable harm] formulation may differ in some respects from that of other courts, we believe it only makes more explicit what they meant by a 'material non-disclosure or misrepresentation.'"); *id.* at 1338 ("[T]he notion of materiality of non-disclosure or misrepresentation in the wire fraud context must logically focus on the reasonable foreseeability by the employee of potential economic harm to his employer.").[3]

---

[3] Although petitioner suggests (Pet. 14-15) that the courts of appeals disagree on other issues concerning the scope of honest services fraud under Section 1346, this case provides no opportunity to resolve those questions. For example, petitioner notes that the Fifth Circuit appears to require proof that the defendant violated a duty owed under state law. *United States* v. *Brumley*, 116 F.3d 728, 734 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997). The defendant in *Brumley*, however, was a state adjudicative officer who accepted payments from lawyers who practiced before him. Because the defendant in *Brumley* was a state employee, the court had no occasion to consider the application of Section 1346 to private sector defendants. In any event, the court of appeals in this case did not address the question whether the government is required to prove a state law source of the right of honest services in either the private or public sector, and the law in the Seventh Circuit is unsettled. See *United States* v. *Martin*, 195 F.3d 961, 967 (7th Cir. 1999) ("[W]e shall adhere to our anti-*Brumley* position for now, but without prejudice to reexamining it without preconceptions should a full argument against it be mounted in a future case."), cert. denied, 530 U.S. 1263 (2000).

Petitioner also asserts that two other circuits have rejected the requirement adopted by the Seventh Circuit in *United States* v. *Bloom*, 149 F.3d 649, 655 (1998), that the government must show that a defendant's misuse of his fiduciary position resulted in personal gain in order to establish a scheme to defraud. In *United States* v. *Welch*, 327 F.3d 1081, 1106-1107 (10th Cir. 2003), however, the court held only that an indictment must allege an intent to deprive the victim of the right of honest services, not that it

d. Contrary to petitioner's contention (Pet. 16-18), the evidence at trial was sufficient to show that petitioner and Hausmann conspired to deprive Hausmann's clients of their intangible right to Hausmann's honest services. As an attorney, Hausmann owed a fiduciary duty to his clients. See Pet. App. 45 (magistrate judge notes that "[petitioner and Hausmann] agree with the general proposition that there exists a fiduciary relationship between a lawyer and a client"). Hausmann clearly breached that fiduciary duty by failing to disclose his kickback arrangement with petitioner. See, *e.g.*, *United States* v. *Dial*, 757 F.2d 163, 168 (7th Cir.) ("Even more clearly is it fraud to fail to 'level' with one to whom one owes fiduciary duties. The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal's alter ego rather than to assume the standard arm's length stance of traders in a market."), cert. denied, 474 U.S. 838 (1985).

Moreover, Hausmann misused his fiduciary position for personal gain, since he failed to disclose to his

---

must allege an intent to achieve personal gain. In *United States* v. *Panarella*, 277 F.3d 678, 694 (3d Cir.), cert. denied, 537 U.S. 819 (2002), the court stated that, "[r]ather than limiting honest services fraud to misuse of office for personal gain, we hold that a public official who conceals a financial interest in violation of state criminal law while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud." The court in *Panarella* went on to note, however, that its holding was "limited to public officials, and does not reach private officials' breach of a fiduciary duty to disclose." *Id.* at 699; see *id.* at 699 n.9 ("Although we hold that the existence of a violation of state law, coupled with the other facts discussed above, is *sufficient* to establish honest services wire fraud in this case, we need not decide whether a violation of state law is *necessary* for non-disclosure of a conflict of interest to amount to honest services fraud.").

clients that he was receiving—in addition to the one-third portion of the insurance settlement proceeds to which his clients had agreed—kickbacks amounting to 20% of the medical bills for services provided by petitioner to the clients. Cf. *McNally*, 483 U.S. at 355 (noting that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud" under the intangible rights theory). Furthermore, the concealment of the kickback scheme was material to the clients' decisions about both legal representation and medical treatment. Because the medical bills were deducted from the client's two-thirds portion of the insurance settlement proceeds, the kickback scheme directly reduced the client's share of the settlement proceeds while enriching Hausmann. In light of that direct economic effect on the client's interests, disclosure of the kickback scheme would have naturally tended to lead a reasonable client to object to such an arrangement. Thus, the conspiratorial agreement in this case involved far more than a mere breach of fiduciary duty or nondisclosure of a conflict of interest.

Application of the "reasonably foreseeable harm" test would not produce a different outcome here. As the court of appeals recognized, the kickbacks paid by petitioner amounted to an "effective twenty percent fee discount" on the medical bills for clients referred by Hausmann. Pet. App. 8. Because the medical bills were deducted from the client's two-thirds portion of the insurance settlement proceeds, "that discount should have inured to the benefit of [Hausmann's] clients." *Ibid.* The kickback scheme, however, allowed Hausmann to obtain a share of the insurance settlement proceeds in each case in excess of the one-third portion to which the clients had agreed. At the same time, the kickback scheme necessarily reduced the client's share

of the recovery on a direct dollar-for-dollar basis. It was therefore reasonably foreseeable that the kickback arrangement would result in economic harm to Hausmann's clients.

Petitioner does not identify any instance in which another court of appeals has reached a contrary result in a case involving comparable facts. Petitioner asserts (Pet. 8) that *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), is "strikingly similar," but that case is distinguishable. In *Jain*, the Eighth Circuit reversed the mail fraud conviction of a psychologist who was paid kickbacks by a hospital for patient referrals. The court concluded that there was "no evidence that any patient suffered tangible harm" because the psychologist provided quality services, each patient required hospitalization, the hospital provided proper care, and no patient was financially harmed by the kickback arrangement. *Id.* at 441. In contrast, the kickbacks paid by petitioner to Hausmann in this case harmed Hausmann's clients, because the inclusion of the 20% kickback in the medical bills effectively reduced the client's share of the recovery. Accordingly, there is no conflict between *Jain* and the court of appeals' decision in this case.[4]

---

[4] Petitioner also asserts (Pet. 10) that the court of appeals' decision in this case is inconsistent with *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983). In *Feldman*, the Seventh Circuit stated that, "[w]hen an employee breaches a fiduciary duty to disclose information to his employer, that breach of duty can support a mail or wire fraud conviction only if the nondisclosed information was material to the conduct of the employer's business and the nondisclosure could or does result in harm to the employer." *Id.* at 763. *Feldman*'s requirement of potential harm to the employer, however, adds little to the requirement of a material nondisclosure, "[s]ince an employer presumably

2. Petitioner contends (Pet. 18-24) that 18 U.S.C. 1346 is unconstitutionally vague as applied to his conduct. That claim lacks merit and does not warrant this Court's review.

The Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); see *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (opinion of Stevens, J.). Under this Court's precedents, petitioner may not attack Section 1346 as unconstitutionally vague simply by showing that hypothetical situations may exist in which the statute would be ambiguous. Rather, petitioner can prevail only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must

---

would 'change its business conduct' only if, upon disclosure of [a conflict of interest] and any other relevant information, it saw new opportunities for profit or savings, or dangers of economic harm." *Lemire*, 720 F.2d at 1338. *Feldman* recognized, moreover, that mail fraud convictions had been upheld "where a defendant employee was receiving kickbacks which might have caused the employer to pay a higher price than necessary for certain items." 711 F.2d at 763. In any event, any inconsistency between the Seventh Circuit's decisions in this case and in *Feldman* should be resolved by the court of appeals rather than by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

The application of Section 1346 to the deceptive breach of Hausmann's fiduciary duties is fully consistent with the classical definition of fraud, which includes the deliberate concealment of material information in a setting of fiduciary obligation.[5] See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 653-654 (1997). It is also fully consistent with pre-*McNally* decisions applying the "honest services" theory, which reflect the understanding of the mail and wire fraud statutes that Congress sought to restore when it enacted Section 1346. See, *e.g.*, *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.) (noting that mail fraud convictions had been upheld "where a defendant employee was re-

---

[5] For that reason, there is no substance to petitioner's suggestion (Pet. 15, 23) that Hausmann's conduct involved merely a violation of a state ethical rule. Nor is there any force to petitioner's suggestion (Pet. 15-16) that a professional's failure to disclose any ulterior motive—such as high school friendship or family connections—for referring a client to another professional necessarily amounts to honest services fraud under the the court of appeals' decision in this case. Under the court's decision, a failure to disclose in breach of a fiduciary duty amounts to honest services fraud only when it results in personal gain. See Pet. App. 6 ("[A] valid indictment need only allege, and a finder of fact need only believe, that a defendant used the interstate mails or wire communications system in furtherance of a scheme to misuse his fiduciary relationship for gain at the expense of the party to whom the fiduciary duty was owed."). Moreover, a failure to disclose rises to the level of a breach of a fiduciary duty only when it involves the concealment of *material* information. Finally, to establish honest services fraud, the government must also prove that the defendant acted with fraudulent intent.

ceiving kickbacks which might have caused the employer to pay a higher price than necessary for certain items"), cert. denied, 464 U.S. 939 (1983). Indeed, prosecutions based on kickbacks to fiduciaries were regularly brought on the theory of honest services fraud before *McNally* was decided. See *McNally*, 483 U.S. at 363 (Stevens, J., dissenting) ("In the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information."). Against that legal backdrop, a "person of ordinary intelligence," *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976) (per curiam), would know that the kickback scheme fraudulently deprived Hausmann's clients of the honest services of their attorney. And because "the knowing payer of an illegal kickback is criminally liable for conspiracy to commit mail or wire fraud to the same extent as the recipient of such a payment," Pet. App. 9, the application of Section 1346 to petitioner's conduct is likewise consistent with the Due Process Clause.

The courts of appeals have uniformly rejected claims that Section 1346 is unconstitutionally vague. See, *e.g.*, *Rybicki*, 354 F.3d at 132; *Welch*, 327 F.3d at 1109 n.29; *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Paradies*, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997); *United States* v. *Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997); *United States* v. *Waymer*, 55 F.3d 564, 568-569 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

Petitioner notes (Pet. 21) that the Second Circuit in *United States* v. *Handakas*, 286 F.3d 92, 107, cert. denied, 537 U.S. 894 (2002), found Section 1346 unconstitutionally vague as applied to the facts of that case, which involved a bid contractor working for a state school authority who willfully breached a contractual requirement that he pay his employees the prevailing wage and who misrepresented the wages on a disclosure form that he was required to file with the State. 286 F.3d at 96-97. *Handakas* thus involved a breach of a contractual obligation rather than, as in this case, a deceptive breach of a fiduciary duty. See Pet. App. 11 (distinguishing *Handakas* on that basis). In any event, as petitioner recognizes (Pet. 22), the Second Circuit recently "overrule[d] the unnecessary constitutional ruling" in *Handakas*. *Rybicki*, 354 F.3d at 144. Review by this Court of petitioner's due process claim is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

APRIL 2004